Office-Supreme Court, U.S.
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80-2213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. _____

WEST GULF MARITIME ASSOCIATION,
Petitioner

-versus-

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The District of Columbia Circuit

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QUESTION PRESENTED

Where tariff regulations of ports organized under state law and expressly by statute made subject to its laws are contrary to state law and therefore unlawful under state law, can such regulations be lawfully found to be "*just* and reasonable" under Section 17 of the Shipping Act of 1916 (Title 46, § 816, U.S.C.), and therefore lawful under federal law, contrary to the holding of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), that there is no federal common law?

LIST OF PARTIES

West Gulf Maritime Association,
complainant before the Federal Maritime Commission, appellant, and petitioner.

United States of America
Federal Maritime Commission, respondents

Port of Houston Authority
City of Galveston, Texas (Galveston Wharves)
Port of Beaumont, Texas
Port of Port Arthur, Texas
Port of Corpus Christi, Texas
Brownsville Navigation District of Cameron County, Texas
Orange County Navigation and Port District, Texas,
respondents before the Federal Maritime Commission, and joint intervenors in the Court below

Board of Commissioners of the Port of New Orleans, Louisiana
Port of Portland, Oregon
California Association of Port Authorities
Northwest Marine Terminal Association, Inc.
Maryland Port Administration
Virginia Port Authority
Hearing Counsel of Federal Maritime Commission,
intervenors before the Federal Maritime Commission but not before the Court below

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PETITION FOR WRIT OF CERTIORARI
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OPINIONS

The Initial Decision of the Administrative Law Judge the Honorable Seymour Glanzer was served September 26, 1979, and is printed in the Appendix, pp. 24-112.

The Order of the Commission Adopting the Initial Decision was served January 28, 1980, and is printed in the Appendix, pp. 16-21. The Commission's Rejection of the Petition for Reconsideration was served March 12, 1980, and is printed in the Appendix, pp. 22-23. None of these is yet officially reported apparently.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 2, 1981. No opinion was written. The judgment appears in the Appendix, pp. 113-114.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

A case believed to sustain the jurisdiction is *State of California v. United States,* 320 U.S. 577 (1944).

STATUTORY PROVISIONS INVOLVED

Federal Statutes

Title 46, U. S. Code

Section 801. Definitions

* * *

"The term 'other person subject to this chapter' means any person not included in the term 'common carrier by water', carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

* * *"

Section 816. Discriminatory rates prohibited; supervision by Commission.

* * *

"Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

Texas State Statutes

V.T.C.A. Water Code, Section 62.078 (Navigation Districts)

(a) "A district established under this chapter may, by and through the commission, sue and be sued in all courts of this state in the name of the district.

(b) "All courts of this state shall take judicial notice of the establishment of all districts."

V.T.C.A. Business and Commerce Code, Section 26.01

"(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

(1) in writing; and

(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to

* * *

(2) a promise by one person to answer for the debt, default, or miscarriage of another person."

Port Tariff Provisions

These are printed in the Appendix, as follows:

Port of Houston Authority, portions of: Items 2, 3 (App. p. 4).

Port of Galveston (Galveston Wharves), Tariff Circular No. 4-D, portions of: Items 5, 30 (App. p. 5).

Port of Corpus Christi, Tariff No. I-J, portions of: Definitions, Items 15 and 52 (App. p. 10).

Port of Brownsville, Tariff No. 2, portions of: Items 105, 110, 111, 115 (App. p. 13).

Port of Beaumont, Tariff No. 4-H, portions of: Items 100, 105, 115-c, 165 (App. p. 6).

Port of Port Arthur, Tariff No. 1-A, portions of: Items 105, 110-A, 120, 175 (App. p. 7).

Port of Orange, Tariff No. 1-J, portions of: Items 85, 115, 120, 130, 195 (App. p. 14).

STATEMENT

The tariffs of the ports of the State of Texas in language identical in meaning make the agents of vessels calling at those ports personally liable (along with their principals the vessel owners and operators) for all of the charges of the port assessed against those vessels. In addition to these imposed liabilities, the tariffs in like manner obligate the agents to collect for the ports, and be personally liable for, all of the port charges levied against the owners of cargoes transported aboard those vessels.

On behalf of its steamship agent members, the trade association West Gulf Maritime Association complained

to the Federal Maritime Commission that these tariff provisions were not "*just* and reasonable", and therefore were unlawful and invalid, under Section 17 of the Shipping Act of 1916 (46 U.S.C. § 816), which empowers the Commission to abrogate tariff provisions which are not just and reasonable, because the provisions were unlawful by the laws of the State of Texas to which laws these creations of the state were by statute and decision expressly subject.

The Commission found the tariff provisions both lawful and reasonable. The Court of Appeals affirmed. It is respectfully submitted that these holdings disregard the principle of the supremacy of state law set forth in the decision of this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

EXISTENCE OF JURISDICTION BELOW

The jurisdiction of the Commission is founded upon Sections 17 and 22 of the Shipping Act (46 U.S.C. §§ 816 and 821). The jurisdiction of the Court of Appeals is conferred by Title 28, Section 2342, U.S.C.

REASONS FOR GRANTING THE WRIT

The Regulations Complained Of

The port authorities in slightly varying language make the agents which represent the vessels (and the vessel owners and operators) which call at their ports personally liable for the charges levied by the port against those vessels.

The tariff provisions which so impose liability are Houston, Items 2 and 3 (App. pp. 91-92); Galveston, Items 5(t), 30, and 185, 2(c) (App. pp. 94-95, 96); Beaumont, Item 105 (App. p. 98); Port Arthur, Items 110-A and 120(A) (App. pp. 100-101); Corpus Christi, Item 15 (App. pp. 102-104); Brownsville, Items 110 and 111 (App. pp. 105-106); and Orange, Item 120 (App. pp. 107-108).

Going even further, the obligation to collect and be personally liable for the port's charges assessed against cargo carried aboard those vessels is imposed upon the vessel agents. Tariff regulations so providing are: (Corpus Christi, Item 15 (App. pp. 102-104); Beaumont, Item 105 (App. p. 98); Port Arthur, Item 110-A (App. p. 100); Brownsville, Item 110 (App. pp. 105-106); and Orange, Item 120 (App. p. 107). Similar provisions are in the Houston and Galveston tariffs.

Agreement to bear such charges is based on the tariff provisions that agents along with others are "users" of the port facilities, and by such use consent to pay all tariff charges and abide by all tariff provisions. These provisions are: Houston, Items 2 and 3 (App. pp. 91-92); Galveston, Items 5(p) and 30 (App. pp. 94-95); Beaumont, Item 165 (App. p. 99); Port Arthur, Item 175 (App. pp. 101-102); Corpus Christi, Item 52 (App. p. 105); Brownsville, Item 105 (App. p. 105); and Orange, Item 195 (App. p. 108).

By Statute The Ports Are Subject To State Law

The port authorities whose tariff provisions are here at issue operate the port facilities of the State of Texas

pursuant to statutes which created them.* The port facilities of the City of Galveston are owned and operated by that municipality, which is of course subject as such to state law.

The ports, denominated Navigation Districts, have by express statute been made subject to state law, Section 62.078 of the Texas Water Code (Acts 1971, Ch. 58) providing

> "A district established under this chapter may, by and through the commission, sue and be sued in all courts of this state in the name of the district."

The antecedent statute with like wording was construed as subjecting the Brownsville District to suit for torts in *Missouri Pacific R. Co. v. Brownsville Navigation District,* 453 S.W.2d 812 (Tex. S.Ct. 1970).

The Principles Of Agency, Suretyship, And The Statute Of Frauds Are Texas Law And Here Applicable

That an agent is not liable upon the contracts of his disclosed principal is of course Texas law:

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* These statutes are: Houston (Harris County), Acts 1927, 40th Leg., 1st C.S., Ch. 97, page 256; Orange, Acts 1953, 53rd Leg., Ch. 370, page 897; Beaumont (Jefferson County), Acts 1949, 51st Leg., Ch. 147, page 270, as amended Acts 1957, 55th Leg., Ch. 20, page 30, and Acts 1961, 57th Leg., Ch. 6, page 8; Port Arthur (Jefferson County), Acts 1963, 58th Leg., Ch. 197, page 528, and Acts 1967, 60th Leg., Ch. 25, page 47; Galveston, Act of 1955, 54th Leg., Ch. 46, page 71; Corpus Christi (Nueces County), Art. 52 of the Constitution and the General Laws of the State of Texas (222 S.W.2d 404); and Brownsville, Acts 1931, 42nd Leg., Sp. Law, Ch. 3, page 5, and Acts of 1929, 41st Leg., Ch. 192, page 410. Since these statutes are not at issue here, there being no dispute as to the status of the ports, they are not reproduced in the appendix.

> "As a general rule, an agent is not personally liable on a contract entered into by him for the benefit of his principal." 3 Tex. Jur. 3d, p. 223.

In *Heffron v. Pollard*, 73 Tex. 96, 11 S.W. 165 (Tex. Sup. Ct. 1889), it was held

> "If the principal be disclosed, and it appears upon the face of the contract that the agent does not intend to bind himself, the agent is not liable." liable."

As part of its Business and Commerce Code, Texas has enacted the Statute of Frauds, the exact words of the Code being

> "Section 26.01. Promise or Agreement Must be In Writing
>
> "(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is
>
> (1) in writing; and
>
> (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.
>
> "(b) Subsection (a) of this section applies to
>
> * * *
>
> (2) a promise by one person to answer for the debt, default, or miscarriage of another person;
>
> * * *"

Under the principles of suretyship, a consensual relationship, a surety cannot be held liable unless his undertaking be in writing: An oral agreement to be surety is void in accordance with the Statute of Frauds. *Chickashaw Lumber Co. v. Blanke,* 185 S.W.2d 140 (Civ. App. Ft. Worth, 1945, writ of error ref., want of merit).

The Agents Of Vessels Are Agents For Disclosed Principals

Vessels entering ports must apply through agents for berths, and that such vessels are disclosed principals is established by the decisions in *Hudson Trading Co. v. Hasler & Co., Inc.,* 11 F.2d 666 (S.D. N.Y. 1926), *Instituto Cubano de Estab., etc. v. SS Theotokos,* 155 F.Supp. 945 (S.D. N.Y. 1957), and *Valkenburg, K.-G. v. SS Henry Denny,* 295 F.2d 330 (7 Cir. 1961).

The Agents Have Not Consented To Be Liable Personally

There is here no evidence that the vessels' agents have ever consented *in writing* or in any other manner to be liable personally for the debts of their principals the vessel owners and operators nor of course the debts of owners and shippers of cargoes transported by those vessels.

The port authorities seek to equate actual consent with a fictional consent by providing that use of the port facilities is consent to be bound by all of the tariff provisions.

Of course tariff provisions and the compilance with them do not rest upon consent. Tariff provisions have

the force of law. *Boston & Maine R.R. v. Piper,* 246 U.S. 439, 38 S.Ct. 354 (1918); *Atlantic Coast Line R. Co. v. Atlantic Bridge Co.,* 57 F.2d 654 (5 Cir. 1932); *In re Tidewater Coal Exchange,* 292 Fed. 225 (S.D. N.Y. 1923), aff'd. 296 Fed. 701 (2 Cir. 1924). Ports are public utilities, *Investigation of Free Time Practices —Port of San Diego,* 9 F.M.C. 525 (1966), and the attempt of the ports to make actual consent to be liable for others' obligations out of use of the port facilities (assuming that an agent "uses" facilities furnished to his principal) is a nullity even if not simply a fiction, under the principle of business duress. Acts constituting business duress are unlawful. *W. R. Grimshaw Co. v. Nevil C. Withrow Co.,* 248 F.2d 896 (8 Cir. 1957), cert. den. 356 U.S. 912 (1958), *Smith v. United States,* 153 F.2d 655 (5 Cir. 1946); *McGowen v. Bush,* 17 Tex. 195 (Tex. S.Ct. 1856), *Ward v. Scarborough,* 236 S.W. 434 (Comm. App. Tex. 1922), *Texas Power & Light Co. v. Doering Hotel Co.,* 147 S.W.2d 897 (Austin Civ. App. 1941), aff'd. 139 Tex. 351, 162 S.W.2d 938 (Tex. S.Ct. 1942).

To Be "Just" A Regulation Must Be Lawful

The Maritime Commission is required by Section 17 of the Shipping Act of 1916 to strike down as invalid those regulations of persons subject to the Act which are not "just and reasonable". The ports here are terminal operators and hence subject to the Act. However reasonable a regulation may be, it cannot rightfully nor lawfully be held to be *"just"* if it be unlawful, it is respectfully submitted.

The Commission has itself construed the word "just" as equivalent in meaning to "lawful", holding in *Investi-*

gation of Free Time Practices—Port of San Diego, 9 F.M.C. 525 (1966)

> ". . . As used in section 17 and as applied to terminal practices, we think that *'just* and reasonable practice' most appropriately means a practice, *otherwise lawful* but not excessive and which is fit and appropriate to the end in view." (Emphasis added.)

In *Black's Law Dictionary* "just" is defined as

> "Conforming to or consonant with, what is legal or lawful, legally right, lawful."

A careful contrast between a loose or popular interpretation of the word and its proper legal meaning is set forth in *State v. Several Parcels of Land,* 116 N.W. 682, 684 (Neb. Sup. Ct. 1908), as follows:

> ". . . we are asked to give to the word 'just' its popular meaning of upright, honest, impartial, fair and equitable, rather than its legal interpretation of true, exact, and conformable to law. . . . If we were to adopt that definition, we might inquire into the need for the tax, and into the motives of officers imposing the same. Such a construction would lead us into a world of uncertainty and conjecture. In determining what is just, the judicial branch of the government should not be permitted to question that mass of principles, which, classified and reduced to order by the legislative power and the interpretation of the courts, we call 'the law'. *It is the very essence of the social compact that we should be governed by those principles of justice which are crystallized into law; and in its administration nothing can be said to be just which is unlawful, and nothing unjust that is lawful."* (Emphasis added.)

Under State Law The Regulations Here Are Not "Just", i.e., Are Unlawful

This Court's decision in *Erie Railroad v. Thompkins*, 304 U.S. 64 (1938), dictates that state law should be determinative of whether or not the tariff regulations of these state-created units of government are lawful, that is, "just".

The rightful application of the *Erie* doctrine to the circumstances of this case is clearly set forth in *First Southern Fed. Sav. v. First Southern Sav.*, 614 F.2d 71 (1980), as follows:

> "As demonstrated by its progeny, *Erie* requires (1) that federal law apply in areas of exclusive federal competence, (2) that state law apply in areas of exclusive state competence, and (3) that state law apply in areas of concurrent federal-state competence unless (a) federal legislation or regulation directly addresses the precise and narrow issue of dispute or (b) the application of federal law is required to protect or to effectuate a valid and substantial federal interest or policy. * * * When, as in this case, extensive federal legislation and regulation exist in the area but do not directly address the precise and narrow issue of litigation, the pertinent analysis assesses whether there exists a valid and substantial federal interest or policy that requires the application of federal law as an exercise of interstitial lawmaking to protect or to effectuate the federal scheme. When no such federal interest or policy exists, *Erie* requires that state law apply. See *Miree v. DeKalb County*, 433 U.S. at 28-29, 97 S.Ct. at 2493-2494; *Bank of America National Trust & Savings Association v. Parnell*, 352 U.S. at 33-34, 77 S.Ct. at 121-122."

And of course the decision in *Erie* has received Congressional approval by the enactment of Section 1652, Title 28 U.S.C., which reads

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

It is respectfully submitted that here there exists no substantial federal interest or policy that warrants the federal agency to deny the efficacy of state law and substitute its judgment of what is "just" for what the state has determined to be lawful.

CONCLUSION

It is respectfully submitted that the Court of Appeals in upholding the decision of the Federal Maritime Commission has decided a federal question in a way in conflict with applicable decisions of this Court and has decided an important question of federal law which has not been but should be settled by this Court, and that this application for issuance of the writ of certiorari should be granted.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals For The District of Columbia Circuit

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STATUTES AND REGULATIONS INVOLVED

STATUTES OF THE UNITED STATES

Title 46, U. S. Code

Section 801. Definitions

* * *

"The term 'other person subject to this chapter' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

* * *"

Section 815. Discriminatory acts prohibited

"* * *

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . ."

Section 816. Discriminatory rates prohibited; supervision by Commission

"No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such injust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such injustly discriminatory or prejudicial rate, fare, or charge.

"Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

STATUTES OF THE STATE OF TEXAS

Water Code

Section 62.078. Suits; Judicial Notice

(a) A district established under this chapter may, by and through the commission, sue and be sued in all courts of this state in the name of the district.

(b) All courts of this state shall take judicial notice of the establishment of all districts.

Business and Commerce Code

Section 26.01.

"(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

(1) in writing; and

(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to

* * *

(2) a promise by one person to answer for the debt, defauts, or miscarriage of another person;"

REGULATIONS

(PORT TARIFFS)

A: *Port of Houston Authority*

1. Portions of Item No. 2, *Application and interpretation of Tariff*, reading as follows:

> The use of the waterways and facilities under jurisdiction of the Port Authority shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified and be governed by all rules and regulations herein contained.
>
> The Port Authority reserves the right to interpret the provisions of this tariff.

2. Portions of Item 3, *Liability for Charges*, reading as follows:

> (a) *Responsibility For Payment*
>
> User or person desiring or proposing the use of any Port Authority property, facility or equipment may be required to deposit, in advance, an amount sufficient to satisfy anticipated cost or expense thereof; or in the alternative, may request extension of credit, in accordance with provisions of paragraph (b) of this Item No. 3.
>
> In absence of an affidavit a User thereby warrants to the Port Authority that he is liable and responsible for payment of charges provided in this tariff and will pay the same as herein provided. If such user desires to relieve himself of such obligations, he shall (a) deposit in cash with the Port Authority the amount of charges estimated by the Port Authority to be due, and (b) in writing state the correct name and address of the owner or party warranted to be responsible for the charges.

B: *Galveston*

1. Portions of Item No. 5, *Application,* Definitions:

(1) *PIER DEMURRAGE OR WHARF DEMURRAGE:* A charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage.

(p) *USAGE:* The use of terminal facility by any rail carrier, lighter operator, trucker, shipper or consignee, their agents, servants and/or employees, when they perform their own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

(t) *WHARFAGE:* A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessel (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

2. Portions of Item No. 30, *Application,* Responsibility for Charges, etc:

The use of waterways and facilities under jurisdiction of the Board of Trustees of the Galveston Wharves shall constitute consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities, to pay all charges specified, including any and all damages to property as provided in Item 75, or reissues, and to be governed by all rules and regulations contained in this tariff.

C: *Beaumont*

1. Portions of Rules and Regulations as follows:
Item 100, Not Common Carrier:

The Port Authority is not a common carrier and is sole interpreter of its tariff rules and regulations.

Item 105, Payment of Charges:

All bills rendered by the Port Authority for service, claims, or for any causes whatsoever, are due and payable upon presentation, and any agents, owners, persons, firms or corporations receiving such bills and failing to make full payment within ten days after presentation shall be placed upon a Deliquent List, conditions of which are hereinafter defined.

The Port Authority does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting any port invoices or bills which may be passed on to shippers and consignees by the vessel, its owner and agent. Such bills are due when presented and must be paid regardless of when the vessel, its owner and agents are reimbursed.

Bills must be paid when presented and errors, if any will be rectified by the Port Authority. Claims in excess of $10.00 will require specific approval of the Port Authority before refund is made.

The Port Authority reserves the right to estimate and collect in advance all charges which may accrue against vessels, their owners and agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Port Authority, whose credit has not been properly established with the Port Authority or who are habitually on the Delinquent List. Use of such facilities may be denied until such advance payments or deposits are made.

The Port Authority reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and agents, or other users of the facilities.

Item 115-c, Wharfage Rules:

(A) Wharfage charges earned on cargo placed on Port Facilities must be paid by vessel owners (operators) or their agents or owner or forwarder of the cargo and placing of such cargo on Port Facilities shall be deemed an acceptance and acknowledgment of this responsibility. Vessel owners (operators) or their agents shall furnish Port Authority manifests on inbound and outbound cargo, as the case may be, loaded to or from Port Facilities.

EXCEPTION—Where provisions are made with owner or agent of cargo, wharfage charges must be collected direct from owner or agent of the cargo.

Item 165, Consent to Terms of Tariff:

The use of the facilities under the jurisdiction of The Port Authority shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents and other users of such facilities to all such charges specifed in this tariff and be governed by all rules and regulations herein contained.

D: *Port Arthur*

1. Portions as follows:

Item 105, Not Common Carrier:

The Port Authority is not a common carrier and is sole interpreter of its tariff rules and regulations.

Item 110-A, Payment of Charges:

All bills rendered by the Port Authority for service, claims or for any causes whatsoever, are due and payable upon presentation, and any Agents, Owners, person, firms or corporations receiving such bills and failing to make full payment within ten days after presentation shall be placed upon a Delinquent List, conditions of which are hereinafter defined.

The Port Authority does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting any port invoices or bills which may be passed on to shippers and consignees by the vessel, its Owner and/or Agent. Such bills are due when presented and must be paid regardless of when the vessel, its Owner and/or Agents are reimbursed.

Bills must be paid when presented and errors, if any, will be rectified by the Port Authority. Claims in excess of $10.00 will require specific approval of the Port Authority before refund is made.

The Port Authority reserves the right to estimate and collect in advance all charges which may accrue against vessels, their Owners and/or Agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Port Authority, whose credit has not been properly established with the Port Authority or who are habitually on the Delinquent List. Use of such facilities may be denied until such advance payments or deposits are made.

The Port Authority reserves the right to apply any payment received against the oldest bills rendered against vessels, their Owners and/or Agents, or other users of the facilities.

Item 120, Wharfage Rules:

(A) Wharfage charges earned on import cargo placed on Port Facilities must be paid by vessel owners (operators) or their Agents and placing of such cargoes on Port Facilities shall be deemed an acceptance and acknowledgment of this responsibility. Vessel Owners (Operators) or their Agents shall furnish Port Authority manifests on import and outbound cargo, as the case may be, loaded to or from Port Facilities. See Exception 1.

EXCEPTION 1.—Where specific arrangements are made with owner or agent of import cargo guaranteeing payment or import wharfage charges, such charges will be collected direct from said owner or agent of the cargo.

(B) Wharfage charges earned on export, Coastwise, Intracoastal, or local cargo must be paid by owner or agent of cargo and placing of such cargo on Port Facilities shall be deemed an acceptance and acknowledgment of these responsibilities. See Exception 2.

EXCEPTION 2.—Where specific arrangements are made with owners or agents of export, Coastwise, Intracoastal, or local cargo guaranteeing payment to Port Authority of wharfage charges earned on export, Coastwise, Intracoastal or local cargo by a railroad, truck line, or other party, such charges will be collected from such railroad, truck line, or other party as the case may be.

Item 175, Consent to Terms of Tariff:

The use of the facilities under the jurisdiction of the Port Authority shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their Owners and/or Agents and other users of such facilities to all such charges specified in this Tariff and to be governed by all rules and regulations herein contained.

E: *Corpus Christi*

1. Portions of Tariff definitions, as follows:

3. Wharfage—A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

2. Portions of Rules and Regulations, as follows:

Item 15, Payment of Charges and Responsibility Therefor; Extensions of Credit; and Liens:

Wharfage, wharf demurrage, car loading and unloading (when not absorbed by the ocean carriers) are due from the owner, shipper or consignee of the cargo, and shall be collected for and on behalf of the Navigation District by the vessel dischrging or loading the cargo, or for which the cargo was received, through the vessel's owner, agent or other person duly authorized to do so, and such vessel and its owner and agent, jointly and severally, shall guarantee and be liable for the payment of such charges to the Navigation District whether or not collected by such vessel or its owner or agent. The use of the wharf or other terminal facility by the vessel or its owner or agent shall constitute acceptance and acknowledgment of this agency, guaranty and liability.

All bills rendered by the Navigation District for wharfage, dockage, wharf demurrage, shed and/or wharf use hire, charges for providing water and electricity, charges for equipment rental, charges for

cleaning wharves and sheds, charges for terminal storage, special services, other services and claims or for any causes whatsoever, are due and payable in cash upon presentation, unless arrangements for extension of credit are made. When credit arrangements have been made, any agents, owners, persons, firms or corporations receiving bills and failing to make full payment after presentation within the time permitted under the credit arrangements may be placed upon a cash basis.

The Navigation District does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting any port invoices or bills which may be passed on to shippers and consignees by the vessel, its owner and agent. Such bills must be paid regardless of when the vessel, its owner and agents, are reimbursed. Any errors in bills will be rectified by the Navigation District.

The Navigation District reserves the right to estimate and collect in advance all charges which may accrue against vessels, their owners and agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Navigation District, whose credit has not been properly established with the Navigation District. Use of such facilities may be denied until such advance payments or deposits are made.

The Navigation District, at its option and subject to termination at its election, may at any time and from time to time extend credit to any user or other person conducting business with the Navigation District under the provisions of this tariff or amendments or reissues thereof by such user or other person establishing and maintaining financial responsibility acceptable to the Navigation District, or by posting and maintaining a single transaction or a period or an

annual surety bond in form and content and with corporate surety acceptable to the Navigation District in amount equal to 125% of maximum liability on a single transaction or equal to an estimated period or estimated annual maximum liability. Further extension of credit may be suspended or terminated by the Navigation District subject to the establishment of added or extended credit acceptable to the Navigation District.

The Navigation District reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and agents, or other users of the facilities.

Presentation of bills to owners and agents of vessels or to stevedores is done as a matter of accommodation and convenience and shall not constitute a waiver of the liens for charges furnished a vessel for which the maritime law gives the lien.

Item 52, Application and Interpretation of Tariff:

The use of the waterways and facilities under jurisdiction of the Navigation District shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified and be governed by all rules and regulations herein contained.

The Navigation District shall be the sole judge as to the interpretation of this tariff.

F: *Brownsville*

1. Portions of Section One—General Rules and Regulations, as follows:

Item 105, Consent to Terms:

Use of the public wharves and related facilities shall constitute consent to the terms and conditions of this tariff, including the payment of all applicable charges specified herein.

Item 110, Collection of Charges:

The District may, at its discretion, extend customary trade credit or require the posting of bond or prepayment of charges. Vessel charges, as set out hereinafter, shall constitute a lien against the vessel and/or her agents. Cargo charges, as set out hereinafter, shall constitute a lien against the merchandise or commodity and/or the custodian at the port thereof. Service charges shall be payable by the party requesting such service.

Item 111, Service Charge on Past Due Accounts:

On all invoices except lease rentals: A service charge will be assessed on all accounts over 30 days old, at a monthly rate of 1½% on the first $500, and 1% on amounts over $500, with a minimum monthly charge of $0.50. *Exception:* Brownsville steamship agencies and stevedoring companies will be assessed on all accounts over 60 days old at the same rates as shown above.

Item 115, Interpretation of Tariff:

The District further reserves the right to be the sole judge in the interpretation of this tariff or any supplements thereto.

G: *Orange*

1. Portions of Application, as follows:

Item 85, Responsibility for Wharfage:

On shipments inward and outward bound, handled over the wharves or piers, or on shipments handled direct between barges or vessels, and vessels that are berthed at wharves or piers, the shipper will be held responsible for wharfage charges, and will not be permitted to load any property from the wharves or piers, or from barges or vessels onto a vessel without prepayment of the wharfage charges, or until satisfactory provisions have been made for the payment.

2. Portions of Rules and Regulations, as follows:

Item 115, Interpretation of Tariff:

The Port District shall be the sole judge as to the interpretation of its Tariff rules and regulations.

Item 120, Payment of Charges:

All bills rendered by the Port District for service, claims or for any causes whatsoever, are due and payable upon presentation, and any owners, agents, companies or persons receiving such bills and failing to make full payment within ten days after presentation shall be placed upon the delinquent list, conditions of which are hereinafter defined.

The Port District does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting storage and similar bills which may be passed on to shippers and consignees by the vessel, its owners and agents. Such bills are due when presented and must be paid regardless of when the vessel, its owners and agents, are reimbursed.

Bills must be paid when presented, and errors, if any, will be rectified by the Port District. Claims in excess of $10.00 will require specific approval of the Port District before refund is made.

The Port District reserves the right to estimate and collect in advance all charges which may accrue against vessels, their owners and agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Port District whose credit has not been properly established with the Port District or who are habitually on the delinquent list. Use of facilities may be denied until such advance payments or deposits are made.

The Port District reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and agents, or other users of facilities.

Item 130, Wharfage:

(A) Wharfage charges must be paid by owner or agent of cargo and placing of said cargo on Port facilities shall be deemed an acceptance and acknowledgement of this responsibility.

Item 195, Consent to Terms of Tariff:

The use of the facilities under the jurisdiction of the Port District shall constitute a consent to the terms and conditions of this Tariff, and evidences an agreement on the part of all vessels, their owners and agents and other users of such facilities to pay all charges specified in this Tariff and be governed by all rules and regulations herein contained.

OPINIONS AND ORDERS OF THE ADMINISTRATIVE AGENCY, THE FEDERAL MARITIME COMMISSION

SERVED

JANUARY 28, 1980

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-15

WEST GULF MARITIME ASSOCIATION

v.

PORT OF HOUSTON AUTHORITY, ET AL.

ORDER ADOPTING INITIAL DECISION

This proceeding was initiated upon the complaint of West Gulf Maritime Association (WGMA),[1] filed April 15, 1974, alleging that several terminal tariff provisions published by Respondents, seven ports on the Texas Gulf Coast,[2] violated sections 15 and 17 of the Shipping Act, 1916 (46 U.S.C. 814, 816). The Port of New Orleans, the California Association of Port Authorities, the Virginia Port Authority, the Maryland Port Administration, and the Commission's Bureau of Hearing Counsel intervened. Administrative Law Judge Seymour Glanzer issued

1. WGMA is a trade association composed of steamship agents and owners and stevedore companies, using port facilities along the Gulf of Mexico.

2. Respondents are the Port of Houston Authority, the City of Galveston, the Port of Beaumont, the Port of Port Arthur, the Port of Corpus Christi, the Brownsville Navigation District of Cameron County, and the Orange County Navigation and Port District.

an Initial Decision,[3] served September 26, 1979, which is before the Commission on WGMA's Exceptions. Respondents filed a Joint Reply to Exceptions, and Hearing Counsel also replied.

TARIFF PROVISIONS

The text of the tariff provisions in issue is attached as Appendix A to the Initial Decision. The tariff provisions are largely duplicative, with many of the ports' tariffs using identical language. Although approximately 35 tariff provisions are challenged in this proceeding, they may be categorized into four major groups:

1. Each of Respondents' tariffs provides that use constitutes consent to the terms and conditions of the tariffs, and that vessel agents are "users" of the ports' facilities. The ports bill the vessel agents and hold them liable for dockage, wharfage, and outbound cargo demurrage charges.

2. A tariff provision published only by Galveston provides that when cargo cannot be removed from piers or transit sheds because of strike interference, cargo already in penalty or compensatory demurrage status will be subject to compensatory rates.

3. Six of the Respondent ports publish tariff provisions stating that the ports are the "interpreter," "sole interpreter," or "sole judge" of the tariffs.

4. Three ports publish tariff items requiring stevedores who rent port-owned cranes to assume liability for the negligent actions of the port-provided crane operators, while under the control and supervision of the stevedores.

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3. 19 S.R.R. 859 (1979).

DISCUSSION AND CONCLUSIONS

The Presiding Officer found that the provisions stating that the ports were the sole interpreter of the tariffs were unjust and unreasonable under section 17. No exceptions to this finding were filed. The Commission concludes that this finding of the Presiding Officer is correct, and it is therefore adopted.

The Presiding Officer also found that the remaining tariff provisions complained of by WGMA were lawful and reasonable. To these findings WGMA filed 59 exceptions, 54 of which were unaccompanied by references to the record, as required by the Commission's Rules of Practice and Procedure, 46 C.F.R. section 502.227(a). WGMA's Exceptions consist of a list of general disagreements with the findings of fact and conclusions of law made by the Presiding Officer. For the reasons stated below, the Commission finds that the exceptions are without merit and that the findings and conclusions of the Initial Decision are proper and well-founded. Accordingly, the Commission adopts the Initial Decision as its own.

The "use equals consent" provisions merely inform users of their responsibilities and impose no disadvantage or unreasonable practice upon them. The Commission has previously found that "consent" language adds no independent validity to provisions imposing liability. *West Gulf Maritime Association v. Port of Houston Authority*, 18 S.R.R. 783, 789 (1978),[4] *aff'd mem. sub nom., West Gulf Maritime Association v. Federal Maritime Commission*, No. 78-2021 (D.C. Cir., Dec. 31, 1979). That finding applies to the instant tariff provisions as well.

4. Hereinafter cited as *WGMA v. PHA*.

Similarly, the issue whether vessel agents can be held responsible for various port charges was already decided in the affirmative in *WGMA v. PHA*. Additionally, in *West Gulf Maritime Association v. City of Galveston*, 19 S.R.R. 779 (1979), the Commission found that tariff provisions defining "users" to include steamship agents were reasonable and lawful. Accordingly, the Commission concurs with the Presiding Officer's conclusion that the port charges for which the vessel agents are made liable are reasonably related to the vessel interests' use of the ports, and are therefore reasonably borne by the vessel agents.[5]

The application of compensatory rates to cargo in a penalty or compensatory demurrage status at the time of strike interference, is consistent with the principles enunciated in *Free Time and Demurrage Charges at New York*, 3 U.S.M.C. 89 (1948).[6] The Commission concludes, therefore, as did the United States District Court for the Southern District of Texas,[7] that this demurrage practice is reasonable and nondiscriminatory.[8]

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5. The Commission also concurs with the finding in the Initial Decision that the statute of frauds issue raised by WGMA is inapplicable and is not controlling absent a showing that the state law principles directly apply to Shipping Act considerations.

6. The Commission there stated: "When property lies at rest on a pier after free time has expired, and consignees, through reasons beyond their control, are unable to remove it, . . . [penal charges] are a useless, and consequently unjust burden upon consignees, and a source of unearned revenue to carriers. . . . The carrier is entitled, however, to fair compensation for sheltering and protecting a consignee's property during the period of involuntary bailment after expiration of free time." 3 U.S.M.C. 107-108.

7. *City of Galveston v. Kerr Steamship Co., Inc.*, 362 F.Supp. 289 (S.D. Tex. 1973), *aff'd*, 503 F.2d 1401 (5th Cir. 1974), *cert. denied*, 420 U.S. 975 (1975).

8. Galveston's practice is also consistent with that mandated by the Commission for import cargo at the Port of New York (46

Finally, the Commission finds that the tariff items involving liability for the negligence of crane operators are reasonable. WGMA's contention that the tariff items violate the principle of *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) is unfounded.[9] The record indicates that the monopolistic conditions which were present in the towing industry at the time of *Bisso* and were crucial to the Court's decision, are not present with respect to the instant crane rental operations. Port users can and do obtain crane services other than from the ports. Both a federal and a state court found similar crane rental operations not to offend state and common law principals,[10] and the Commission affirms the lawfulness of the provisions under the Shipping Act.[11]

In conclusion, the findings of the Presiding Officer, contrary to the allegations in WGMA's exceptions, are amply supported by the evidence of record.[12]

U.S.C. section 526.1(d), (f)), and for export cargo at the Ports of New York and Philadelphia (46 U.S.C. section 541.1(f)).

9. In *Bisso*, the Court dealt with the general rule forbidding common carriers and utilities from stipulating for immunity from their own negligence. The Court explained the justifications for the rule as being:

> (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. 349 U.S. 91.

10. *Southern Steamship Company v. Meyners*, 110 F.2d 376 (5th Cir.), *cert. denied*, 311 U.S. 674 (1940), and *Rorie v. City of Galveston*, 471 S.W.2d 789 (Tex. 1971), *cert. denied*, 405 U.S. 988 (1972).

11. The Commission notes that users of the crane services benefit financially from the use of the ports' cranes; that the users are in operational control of the crane operators; that stevedores may and do choose specific operators; and that the tariff items' terms are similar to those offered by competing private crane rental companies.

12. All exceptions of WGMA have been carefully reviewed and considered, and found to be without merit.

THEREFORE, IT IS ORDERED, That the Exceptions of the West Gulf Maritime Authority are denied; and

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is adopted by the Commission; and

IT IS FURTHER ORDERED, That this proceeding is discontinued. By the Commission.

/s/ FRANCIS C. HURNEY
Francis C. Hurney
Secretary

[SEAL]

SERVED

MARCH 12, 1980

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-15

WEST GULF MARITIME ASSOCIATION

v.

PORT OF HOUSTON AUTHORITY, ET AL.

REJECTION OF PETITION

Counsel for complainant in this proceeding has filed a petition for reconsideration of the Commission's January 28, 1980 Order Adopting Initial Decision.

The Commission's recent amendment to Rule 261 of the Rules of Practice states that a petition for reconsideration will be subject to summary rejection unless it (1) specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order; (2) identifies a substantive error in material fact contained in the decision or order; or (3) addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party.

Complainant's petition satisfies none of the three requirements. It merely alleges the Commission erred in reaching its conclusions. Accordingly, the petition for

reconsideration is summarily rejected pursuant to Rule 261.

By the Commission.*

/s/ FRANCIS C. HURNEY
Francis C. Hurney
Secretary

[SEAL]

* Commissioner Kanuk is opposed to summary rejection of the petition, but would deny it on the merits.

FEDERAL MARITIME COMMISSION

SERVED SEPTEMBER 26, 1979

EXCEPTIONS DUE 10-18-79

REPLIES TO EXCEPTIONS DUE 11-9-79

FEDERAL MARITIME COMMISSION

NO. 74-15

WEST GULF MARITIME ASSOCIATION

v.

PORT OF HOUSTON AUTHORITY, ET AL.

Tariff provisions which charge vessels agents with liability for payment of vessel charges, including wharfage, dockage, wharf demurrage and strike demurrage do not violate sections 15, 16 First or 17 of the Shipping Act, 1916. Galveston Wharves strike demurrage tariff provision does not unduly or unreasonably prefer or discriminate against types of cargo, shippers, carriers or their agents in violation of sections 16 First or 17 of the Shipping Act, 1916.

Tariff provisions which purport to allow the ports to interpret provisions of their tariffs are unjust and unreasonable practices relating to or connected with the receiving, handling, storing or delivery of property in violation of section 17 of the Shipping Act, 1916.

Tariff provisions which make crane operators the borrowed servant of the crane user and make the crane user liable for the negligence of the crane operator while under the supervision, direction and control of the user are not unjust and unreasonable and do not violate sections 15 or 17 of the Shipping Act of 1916.

Robert Eikel and *J. T. Davey* for complainant, West Gulf Maritime Association.

F. William Colburn for respondent, Port of Houston Authority.

Benjamin R. Powel for respondent, City of Galveston (Galveston Wharves).

M. Harvey Weil for respondents, Nueces County Navigation District No. 1 (Port of Corpus Christi) and Brownsville Navigation District.

Tom Moore Featherston for respondent, Port of Port Arthur Navigation District of Jefferson County.

Malcolm M. Dorman for respondent, Orange County Navigation District and Port Administration.

Dan Rentfro for respondent, Port of Brownsville.

Doyle G. Owens for respondent, Port of Beaumont.

Burt Pines, Jack L. Wells and *Frank Wagner* for intervenor, California Association of Port Authorities.

Edward Schmeltzer, Edward J. Sheppard and *George Weiner* for intervenor, The Board of Commissioners of the Port of New Orleans.

J. Robert Bray and *Arthur W. Jacocks* for intervenor Virginia Ports Authority.

Gary Koecheler for intervenor, Maryland Port Administration.

John Robert Ewers, Lizann Malleson Longstreet, and *Aaron W. Reese* as Hearing Counsel.

Sam H. Lloyds for Georgia Ports Authority, appearing specially.

Milton A. Mowat and *Robert L. Henry* for intervenors, Port of Portland and Northwest Marine Terminals Association, Inc.

INITIAL DECISION[1] OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

This is a complaint proceeding, filed April 15, 1974, pursuant to the provisions of section 22 of the Shipping Act, 1916,[2] by West Gulf Maritime Association (WG MA), complainant, alleging violations of sections 15 and 17 of the Shipping Act, 1916,[3] by Port of Houston Authority (PHA), the City of Galveston (Galveston Wharves), Port of Beaumont, Texas (Beaumont), Port of Port Arthur, Texas (Port Arthur), Port of Corpus Christi (Nueces County Navigation District No. 1) (Corpus Christi), Brownsville Navigation District of Cameron County, Texas (Brownsville), and the Orange County Navigation and Port District, Texas (Orange), respondents, and requesting that specified tariff matter published by the respondents[4] be declared unjust, un-

1. This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

2. 46 U.S.C. 821.

3. 46 U.S.C. 814 and 816.

4. After post hearing briefs were served and filed it became apparent that there was a need to clarify which of the tariff provisions placed in issue by the complainant by way of the complaint or by way of evidence introduced at the hearing remained in issue and under attack by the complainant at the close of the hearing. Therefore, at a post hearing conference on September 12, 1978, I distributed copies of a compilation, then entitled Appendix, containing the identification and text of those tariff provisions which, preliminarily, seemed to fall in that category. The parties were directed to advise me on the correctness of the Appendix. The complainant and all respondents, except Beaumont, responded. Generally, the respondents stated that the Appendix correctly reflected their understanding of the tariff provisions in issue at the close of the hearing, but several advised that some tariff changes occurring either prior to or during the hearing or subsequent to the close of the record should be noted. However, by letter dated September 12, 1978, the

reasonable, discriminatory and unlawful and further requesting that the tariff matter be ordered null and void and that the respondents be ordered to cease and desist from acting in accordance with and from seeking to enforce the tariff matter against complainant's members and requesting still further the issuance of such orders as may be necessary to secure compliance with the law by respondents. Reparation is not requested.

The answers of all respondents allege that the tariff matter appearing in each of their tariffs is just and reasonable and not discriminatory and not violative of any provisions of law.

WGMA is a trade association composed of (1) almost all the steamship agents representing operators of deep sea cargo vessels using the ports of the Gulf of Mexico from Lake Charles, Louisiana, to Brownsville, Texas, inclusive, (2) the owners of some of those vessels and (3) stevedoring firms whose employees load and unload those vessels.

All respondents operate port and terminal facilities in the State of Texas pursuant to provisions of the Constitution and other laws of the State. Each respondent, except Galveston Wharves, does so as a navigation district, which is a government agency, body politic and political subdivision of the State. Galveston Wharves derives its

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complainant adopted the Appendix as a correct statement of those tariff provisions which it contends violate the Shipping Act, 1916, advising, "The tariff provisions set forth in the Appendix presented at the conference on September 12 it is agreed by complainant are those at issue." WGMA's views of what is under attack will be accepted for the purposes of this decision.
The Appendix has been incorporated in the initial decision as Appendix A. Pertinent respondent comments appear as footnotes to the text of Appendix A.

authority from the charter of the City of Galveston, a home rule city, which conducts the business of Galveston Wharves through a separate Board of Trustees.

Under appropriate provisions of Texas law—i.e., the Texas Water Code, special statutes creating some of the navigation districts or the City of Galveston's charter and applicable statutes—the respondents are authorized, among other things, to acquire and own land and purchase, construct, enlarge, extend, repair, maintain, operate and develop wharves, docks and other facilities or aids incidental to or useful in the operation or development of ports or waterways or in aid of navigation and commerce in the ports and waterways. In addition, the respondents are empowered to prescribe fees and charges to be collected for use of their land improvement and facilities. The fees and charges must be reasonable, equitable and sufficient to produce revenue adequate to pay expenses.[5]

Several persons intervened. They are the Port of New Orleans (New Orleans), an agency of the State of Louisiana created for the purpose of regulating and promoting the commerce and traffic at that port and administering and maintaining its public wharves and other terminal facilities; California Association of Port Authorities (California); Virginia Port Authority (Virginia); Maryland Port Administration (Maryland), and Hearing Counsel.[6] The Georgia Ports Authority appeared specially, but did not participate in the proceeding. All parties, except those

5. See, e.g., Texas Water Code Ch. 60.101 and 60.103 and Art. 1187f, V.T.C.S.

6. Two intervenors, Port of Portland and Northwest Marine Terminals Association, Inc., withdrew before the conclusion of the hearing.

who withdrew, participated in the proceeding and submitted briefs.[7]

There were 13 days of hearing in the proceeding. The record consists of 1962 pages of transcript and 65 numbered exhibits.

Contentions of the Parties

The text of the points of arguments made by WGMA and respondents appears as Appendix B of this decision. WGMA focuses on three distinct categories of provisions published in respondents' tariffs, together with the port practices which implement those provisions, as being violative of the Shipping Act, 1916.

The first category is comprised, usually, of a single tariff provision containing two components and providing: (a) that use of the port's facilities shall constitute consent to and agreement to comply with the regulations and provisions contained in the port's tariff;[8] (b) that vessel agents are users of the port's facilities.[9] Flowing from those provisions is the practice, of each of the respondents, of billing the vessel agent for certain tariff charges acknowledged by WGMA to be proper charges against the vessel (dockage, shed and pier use charges) and other

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7. In accordance with my request, a single joint brief was submitted on behalf of the seven respondents.

8. The consent provisions are as follows: PHA—Item 2; Galveston Wharves—Item 30; Beaumont—Item 165; Port Arthur—Item 175; Corpus Christi—Item 1552; Brownsville—Item 105; Orange—Item 195.

9. The user provisions are generally the same as those in n. 8, *supra*, except that there is a definition of "user" in PHA's tariff, which does not appear in Appendix A and there is no user provision in the portions of Brownsville's tariff appearing in Appendix A.

tariff charges (wharfage and outbound cargo demurrage) which WGMA claims are not proper charges against the vessel but are obligations of the cargo interests.

Also in this first category is a tariff provision published only by Galveston Wharves. It is Item 187 "Interference Due to Strikes." It deals with wharf demurrage and provides, in effect, that when cargo cannot be removed from piers or transit sheds because of strikes: (1) any cargo within the free time period will remain on free time (i.e.: no demurrage charges will accrue during the strike, and (2) any cargo already in a compensatory or penalty demurrage status will remain in demurrage status, but at compensatory rates and not penalty demurrage rates. It is Galveston Wharves' practice to charge the using vessel interest (owner or agent, if the owner is not physically located at Galveston) for outbound demurrage of the second kind.

In the second category are tariff provisions published by six of the respondents[10] containing terms which, in substance, state that the port is the interpreter or sole interpreter of the meaning of the terms and conditions of the tariff.

The third category is concerned with tariff provisions, published by PHA, Galveston Wharves and Corpus Christi, involving the rental of cranes. The rental includes the services of a crane operator employed by the port and the rental charges include the crane operator's salary. In addititon the tariffs provide that the stevedore renting the crane from the port assumes responsibility and liability for the negligent acts of the operator. The practice of

10. WGMA has not cited any Galveston Wharves Tariff provision governing interpretation of its tariff.

transferring liability for employee negligence from the employer to the user of the equipment is known in the law as the "borrowed servant doctrine." See *Rorie v. The City of Galveston*, 471 S.W.2d 789 (Tex. 1971), 8 SRR 20, 713.

Respondents, of course, urge that neither their tariff nor their practices are violative of law.

Intervenor, New Orleans, argues that the tariff provisions at issue in this proceeding are necessary for efficient port operation and that they are not contrary to State or Federal Law, including the Shipping Act, 1916. Generally, the other intervenors, Hearing Counsel, California, Maryland and Virginia, take the same position as New Orleans.

The Post Hearing Conference

Earlier, the post hearing conference of September 12, 1978, was mentioned.[11] Its primary purpose was to ascertain whether there was any desire to reopen the record for the taking of additional evidence or to submit supplemental briefs in the light of the Commission's Report and Order Adopting Initial Decision in Docket No. 75-21, *West Gulf Maritime Association v. Port of Houston Authority of the Port of Houston, Texas.*[12]

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11. N. 4, *supra.*

12. The Report and Order was served August 16, 1978. The Initial Decision was served April 12, 1978. Subsequent to the post hearing conference, WGMA sought judicial review of the Commission's decision. The case is now pending in the United States Court of Appeals for the District of Columbia Circuit under title of *West Gulf Maritime Association v. Federal Maritime Commission and United States of America*, No. 78-2021. The Initial Decision is published at 18 SRR 291. The Commission's decision is published at 18 SRR 783. Hereafter, that case will be identified as *WGMA v. PHA.*

A further purpose was to rectify certain deficiencies in the post hearing briefs.

Under the Commission's Rules of Practice and Procedure, post hearing briefs are required to have a separately captioned section containing proposed findings of fact in serially numbered paragraphs with reference to exhibit numbers and pages of transcript. Rule 221, 46 C.F.R. 502.221.[13]

For the most part, initial briefs contained sections entitled proposed findings of fact. Yet, the proffered material was as much conclusionary as factual, but, even when factual, there was little or no reference to the portions of the record relied on. In view of the sizeable record and the breadth of the arguments these omissions presented palpable drawbacks to informed decision making and to the best interests of the litigants.

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13. Rule 221 provides in pertinent part:
Briefs; requests for findings.
The presiding officer shall fix the time and manner of filing briefs and any enlargement of time. The period of time allowed shall be the same for all parties unless the presiding officer, for good cause shown, directs otherwise. Briefs shall be served upon all parties pursuant to Subpart H of this part. . . . In investigations instituted on the Commission's own motions, the presiding officer may require Hearing Counsel to file a request for findings of fact and conclusions within a reasonable time prior to the filing of briefs. Service of the request shall be in accordance with the provisions of Subpart H of this part (Rule 8). Unless otherwise ordered by the presiding officer, opening or initial briefs shall contain the following matters in separately captioned sections: introductory section describing the nature and background of the case, proposed findings of fact in serially numbered paragraphs with reference to exhibit numbers and pages of the transcript, argument based upon principles of law with appropriate citations of the authorities relied upon, and conclusions. The Presiding Officer may limit the number of pages to be contained in a brief. All briefs shall contain a subject index or table of contents with page references and a list [of] authorities cited. . . .

To remedy the problem a two round procedural schedule was developed. It was made applicable to the primary litigants but was optional for intervenors. The first round called for simultaneous submissions of proposed findings of fact, in accordance with Rule 221, by WGMA and by respondents jointly. In the second round, the parties were instructed to indicate whether and how they differed with the other side's proposed findings.[14]

In their first and second round submissions, the respondents complied with the directions given. In the second round they also observed, generally, that many of complainant's first round proposed findings were not cited to the record. The complainant did not file any second round comments.[15]

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14. For a summary of the procedural schedule, see Notice of Order Fixing Time for Certain Filings, served September 14, 1978 Most intervenors stood on their opening briefs. New Orleans opteu to file in the opening round. Hearing Counsel participated in both rounds, generally concurring with respondents in the first, but it added some other proposals. On the second, Hearing Counsel limited its response to taking issue with certain of complainants's proposals relating to the Port of Houston's wharfage practices on the grounds that those practices were found lawful in *WGMA v. PHA, supra.*

15. By letter of December 18, 1978, complainant wrote:

> The complainants do not feel it necessary to file a rejoinder to the Respondents' Reply to the Complainants' Requested Findings of Facts, because many of the separate replies where in disagreement with the complainants' requests are argumentative in character and no good purpose would be served in replying argumentatively.

Taken literally, this cryptic passage would appear to mean that complainant declined an opportunity for a third round submission. However, I understand it differently. I read it to mean that complainant would not be participating in the second round. I reach this conclusion because of a telephone conversation with complainant's counsel after the time to file the second round expired. I inquired if, perhaps, complainant's second round might have gone astray inasmuch as I could not locate it in the official docket. I was informed that complainant did not regard my ruling to mandatorily require

Facts

Preliminarily, it is noted that the burden of proof is on the "party proposing to halt existing tariff practices."[16] Here, then, the burden lies with WGMA. For convenience, the findings will generally follow the sequence suggested by WGMA's proposed findings of fact.

Agent Liability for Dockage, Shed and Pier (Wharf)[17] Use Charges

1. Certain things are undisputed by WGMA. Respondent's tariffs define "dockage," "shed hire" and "pier or wharf use hire" as charges against the vessel;[18] these are appropriate charges against the vessel or vessel interests insofar as vessel interests mean vessel owner or operator. In some tariffs, in addition to the "user" and "consent" provisions previously mentioned, some of those vessel interest charges are specifically, albeit redundantly, made the responsibility of the vessel agent.[19] The complaint, in

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a second round comment. I asked for written confirmation of that remark. The only writing which followed was the letter of December 18th.

16. *WGMA v. PHA, supra,* 18 SRR at 787-788.

17. Wharf use and wharfage charges are separate charges. Generally, as its name implies, the former is based on the use of the facility for loading or unloading and assembly or distribution of cargo. The latter is measured by the cargo passing or conveyed over the wharves.

18. PHA Tariff No. 8, pp. 7, 9; Galveston Wharves Tariff No. 4-D, pp. 4, 5; Beaumont Tariff No. 4-H, pp. 5, 24; Port Arthur Tariff No. 11-A, pp. 4, 31; Corpus Christi Tariff No. I-J, p. 3A; Brownsville Tariff No. 2, p. 503; Orange Tariff No. 1-J, pp. 4, 22.

19. See, e.g., Galveston Wharves Tariff, *supra,* p. 4; Brownsville Tariff, *supra,* p. 22. Respondents object to the tariff references relating to the definitions of dockage, shed and wharf use hire in WGMA's proposed findings of fact because those provisions were

part concerns the practice of making steamship agents responsible for payment of these admittedly proper vessel charges.

Although the complaint alleges and WGMA argues in brief that the tariff provisions and port practices which make the vessel agent liable for these admittedly proper vessel charges are unjust, unreasonable and unfair, this view is not shared by all WGMA members. Of those WGMA members whose representatives testified, three, speaking as steamship agents, Lykes Bros. Steamship Company,[20] E. S. Binnings[21] and Kerr Steamship Company,[22] do not consider it to be unjust, unreasonable or unfair for agents to be held liable for these charges.

2. Under their tariffs the respondent ports bill the agents and insist upon payment from the agent for the

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not included in Appendix A. Whatever technical merit may attach to the objection, it simply is not well taken because the complaint assails all vessel charges for which the agent is made liable.

20. Lykes' position was stated by a senior vice-president, who distinguished between charges conceded to be those of the vessel (i.e., dockage) and what he considered to be "cargo" charges (i.e., wharfage). His view was emphatic and was reiterated and adhered to despite suggestions from WGMA's counsel that the witness was confused. All of this occurred before a lunch recess. Transcript, Tr. 416, 457-461, 466-468. After the recess the witness recanted, indicating he was confused in his earlier responses, after all. Tr. 475-482. However, as noted in the record, I commented at the time on the witness' demeanor (Tr. 482) and based upon his testimony and my observations during the entire time the witness was on the stand, scant credence can be given to the disclaimer.

21. Tr. 151.

22. Tr. 356-357. Kerr, however, limits its position to those circumstances in which it has secured an advance or is otherwise put in funds by the vessel interests. Curiously, even though it is Kerr which decides whether or not to seek advances, Kerr believes the ports should share, with the agent, the risk of nonpayment.

vessel's port charges.[23] This is a common practice throughout the ports of the United States.[24]

Agents play a vital role in water transportation. Vessel owners and operators must be represented at local ports for obviously they cannot accompany their vessels throughout each voyage. Among other things, owners and operators rely upon the agent's experience and expertise in dealing with local businessmen and ports to attend to the vessel's needs. Precisely because agents are local, the ports rely upon the agents and the agents' credit for payment of vessel charges. Under their tariffs and in accordance with custom ports deal with agents as principals in assigning berths and cargo space and providing service for it is essential to good port operations that a well accepted local agent be present to assume financial responsibility for payment of port charges.[25]

Agents recognize their value to vessel owners and operators. Although agents solicit as much representation as they can handle or is prudent, they do so selectively. One of the criteria for choosing to represent a particular principal is that principal's creditworthiness. As put by one agent "A steamship company's creditworthiness fluctuates violently with the charter market and cargo market."[26] The principal's creditworthiness is important to agents not only because they are liable for port charges but because their agency fees are also dependent upon the priincipal's ability to pay.

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23. It should be borne in mind that wharfage is treated as a vessel's port charge by ports whose tariff provisions make wharfage a liability of the vessel.

24. Ex. 65; Tr. 1386, 1640, 1690.

25. Exs. 50, 58, 62.

26. Tr. 59.

Unless assured by the principal's financial strength, and often times even then, agents seek to be put in funds by their principals. This is accomplished by written or oral agreement, as circumstances warrant or permit, and most frequently takes the form of advances or authorization to make disbursements from freight revenues.[27]

An agent explained that for the most part it is not necessary to obtain advances from liners because of their frequent port calls, but some liners might have a bad reputation, in which cases advances are required; from tramps, advances are essential.[28] However, advances are not sought when the agent collects freight revenues on behalf of its principals (usually liners) and has authorization to deduct disbursements for vessel expenses before remitting the revenues to the principals.[29]

In particular, WGMA singles out PHA for the "pressures" it applies to collect vessel expenses from agents. PHA does not prefer that characterization but it does admit it has engaged in certain practices to insure the integrity of its tariff but it denies it has engaged in others. The details follow.

It is the general practice in all Texas ports for agents to make advance arrangements with the port for vessel facilities and services, e.g., berth space, shed hire, water and other port services.[30] From time to time, in accordance with its tariffs and practices, PHA refused to assign berths to some agents for inbound vessels until they (the

27. See, e.g., Tr. 65, 130, 317, 413-414, 606, 682, 770.

28. Tr. 130.

29. Tr. 318, 413-414.

30. Tr. 618, 851, 973, 1088.

agents) paid their delinquent accounts—accounts which were more than 30 days overdue; pursuant to Item 3(a) of PHA's tariff some agents have been threatened with berth denial until their accounts were paid, but no vessel was ever denied a berth;[31] occasionally, PHA placed or threatened to place some agents on a cash basis and required deposits against anticipated port charges from agents who failed and refused to timely pay port charges.

All agents active at Texas ports are aware of the tariffs, customs and practices which make them liable as principals for vessel expenses. They know that the ports rely on their credit and not that of the vessel when berthing arrangements are made and port services are furnished. Consequently, an agent may be subject to some or all of the foregoing admitted practices, even to the extent of possible denial of berth space (to the agent) for a particular vessel because the agent's PHA account is overdue for a different vessel.

But, as seen, no vessel was ever denied a berth for the reason that the agent's account was overdue for a different vessel. Moreover, WGMA has neither cited nor placed in issue any provision of PHA's tariff which conceivably would allow or result in allowing PHA to apply an agent's payment of the debt of one principal to the account of another. Rather, it has been established that PHA agressively sought payment of delinquent accounts. In pursuing that program, pursuant to Item 3(a) of its tariff, PHA did require that a delinquent prospective user of a berth

31. *Id.* One agent, Fowler & McVitie, Inc., was denied berth space because it refused to pay vessel expenses for port charges incurred in 1966. This agent still refuses to be held responsible for a vessel's port charges. More on Fowler & McVitie will appear in the text, *infra.*

for a second vessel, in advance, to guarantee payment or make arrangements for a cash payment of the second vessel's port charges. There is no evidence that PHA reserved the right, under a tariff provision, "to apply any payment received against the oldest bills rendered against vessels, their owners and/or agents, or other users of the facilities"—a type of tariff provision found to be in violation of section 17. *West Gulf Maritime Association v. The City of Galveston (Board of Trustees of the Galveston Wharves)*, ____SRR____, Report and Order of the Commission served September 14, 1979, at p. 13.

There is no reliable evidence to support WGMA's proposed finding that PHA ever rendered an unfavorable credit report concerning an agent.[32]

WGMA proposes a finding that "One agent, Fowler & McVitie, refused point-blank to acknowledge personal liability for vessel port charges, and it was forced out of business as an agent for cargo vessels by [PHA] for such refusal."

It is true that Fowler & McVitie refused to accept liability for port charges of vessels and continues in that refusal. It is not a fact that Fowler & McVitie was forced out of business or, as implied, that it no longer functions as an agent. The record shows this unequivocally. This appears at Tr. 517 on WGMA's direct examination of its own Fowler & McVitie witness:

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32. On cross-examination by WGMA's counsel, a PHA witness was asked if he ever informed Dun & Bradstreet that some agents were "not trustworthy with respect to granting of credit." The witness responded in the negative. On further cross questioning the witness added that he did answer a specific question posed by D & B concerning ageing of accounts, but that no opinion concerning the agent was given. Tr. 1605-1606.

Q. So, in substance, the port's refusal has driven you out of the agency business for tramp vessels?
A. It hasn't driven me out because there are other ways of doing these things.

The "other ways" consist of arranging for berthing of vessels at PHA through another agent acting as Fowler & McVitie's sub-agent.[33] Because Fowler & McVitie is the only agent which persists in its refusal to accept liability, there is no dearth of sub-agents. These "other ways" are really a charade because Fowler & McVitie insists that the sub-agent and PHA recognize that the vessels are Fowler & McVitie's.

PHA is generally familiar with the identity of the owners or operators of liner vessels that call at that port, but PHA is not knowledgeable about ownership or operation of tramp vessels. There is no reliable evidence to show the extent to which other ports know the identity of liners frequenting their ports. Normally, agents do not inform the ports of the identity of the vessel interest when making berth arrangements.[34] As a result ports are generally unaware of such matters.[35] Moreover, agents sometimes act for undisclosed principles[36] or encounter difficulty in determining who the responsible vessel interest might be. Yet, at least at PHA, the port could readily ascertain ownership identity information by asking it of the agent arranging the berth, provided the agent had accurate information to impart. Thus, even though learning the vessel owner's or operator's identity is not without

33. Tr. 529, 553, 557.

34. Tr. 163, 261.

35. Tr. 260-270.

36. Tr. 356-357. Cf. *WGMA v. PHA, supra,* 18 SRR at 308-309.

its problems, PHA's billing practices were not predicated on ignorance of ownership.[37] As found, the billing practices are based upon the tariff provisions which, in turn, have their foundation in the ports' need to rely upon the credit of a locally responsible entity to pay the fees for port facilities and services.

3. In addition, the foregoing findings demonstrate that agents have many means available to them, whether by agreement, advances, freight revenues or merely by determining creditworthiness of the vessel interest, to ensure that they have sufficient funds available tir ly to pay the port's tariff charges or to be reimbursed for such timely payments, without undue or unfair burden on them.[38] Nevertheless, they are often required to pay port charges out of their own funds when vessel operators delay in approval of accounts or delay in putting agents in funds.[39] Aside from some instances of vessel or principal default or disallowance of invoices for inadequate documentation,[40] there is little, if anything, to indicate that the agents failed to recoup those outlays.

4. Corpus Christi agrees that its practice of holding agents accountable for the vessels' port charges is the same as that of PHA. In fact, to remove any doubt about

37. Tr. 345-346.

38. This should not be construed to mean that agents are never inconvenienced or never suffer losses. Agents are not always able to secure sufficient advances, Tr. 153, 323, 602, 605, 691-692, 769; sometimes there are losses of unspeccified amounts because the vessel interest defaults, Tr. 974, 974A. For one agent there were losses of $16,000 due to a rash of 5 defaults from late 1972 through early 1974. But, this same agent had no defaults from 1962 through 1972. Tr. 108. Another agent lost $3,500 due to default in 1975, Tr. 1086.

39. Ex. 14, 38; Tr. 23, 30, 576, 772.

40. Tr. 573-577.

its position in regard to agent liability to the port, Corpus Christi amended its tariff to provide that its port charges must be paid "regardless of when the . . . agents, are reimbursed."[41]

Certain events seem to have triggered that tariff amendment. Shortly before, Dix Shipping Company of Corpus Christi, an agent at that port, lost monies due to the default of several of its vessel accounts, even though Dix had obtained advances or other assurances (including a guarantee) of payment. Some advances were insufficient, another was paid by "hot check."[42] As a result Dix sent out letters to all its vendors and the port instructing them to make out their invoices to the vessel and not Dix and indicating that Dix would not be responsible for vessel expenses.

Dix's letter prompted action from Corpus Christi which both wrote and telephoned Dix, asking the agent to withdraw its letter insofar as it concerned the port. Initially, Dix did withdraw the first letter by a second letter, guaranteeing vessels' port charges. It later withdraw the second letter and sent a third, containing language provided by its counsel, which said, "Dix . . . agrees to be liable for debts incurred by the vessels under our agency to the extent of our liability under presently existing law." Consequently, Corpus Christi sent another letter advising Dix that unless it agreed to be responsible for facilities and services provided by the port to vessels represented by Dix, the port would expect someone else to make credit arrangements with the port prior to any vessel's

41. Corpus Christi Tariff, *supra*, First Revised Page 4, Item 15, effective May 10, 1974.

42. Under Texas law, a "hot check" is one not honored because of insufficient funds.

use of the port's facilities or services.[43] The tariff amendment followed. Although it changed none of the existing tariff provisions or the practices thereunder, it made the port's position unmistakeable.

Agent Liability for Wharfage and Wharf Demurrage Charges

5. Essentially, wharfage is a charge which may be levied against the cargo or vessel interests. The charge is measured by the cargo crossing over a wharf.[44] Wharf demurrage is a charge imposed when cargo remains in or on terminal facilities after the expiration of free time. Free time for outbound cargo means that there is a period of time when cargo may remain on the wharf without incurring expense, the theory being that "The vessel is required, as part of the obligation of carriage, to provide terminal facilities for the receipt of outbound cargo and to afford a reasonable free time period for the shipper to assemble the cargo prior to loading aboard ship."[45]

It is a common practice at ports in the United States to place responsibility for payment of wharfage and outbound wharf demurrage charges on the vessel interests and, thereby, the agent, under the user, consent or other

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43. Exs. 1, 2; Tr. 78-80. Item 15 of the Corpus Christi Tariff expressly provides for credit arrangements.

44. The Commission's Regulations for Filing of Tariffs by Terminal Operators define Wharfage as follows, 46 CFR 533.6(d)(2):

> A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

45. *WGMA v. PHA, supra,* 18 SRR at 304.

tariff provisions designed to achieve that result.[46] Although the common practice generally prevails at respondents' ports, it does vary. Thus, on some cargoes or in some circumstances the responsibility for payment may be imposed on the cargo interest.[47]

In general and in particular, WGMA assails the practices and tariffs which make steamship agents responsible for wharfage and wharf demurrage charges. The attack is general in the sense that WGMA opposes any tariff provision or port practice which makes those charges the liability of the vessel interests. It is particular in that WGMA disputes the tariffs and practices which make the vessel interests liable for payment of those charges if there is present in tariffs terminology which WGMA opts to construe to mean that the cargo interest is liable for payment. Its specific complaint lies "against the respondents' practices and tariff provisions which impose upon steamship agents the responsibility for collecting and paying to the respondent ports charges which under their tariffs are liabilities of cargo interests—shippers, consignees and owners of cargo."[48]

First, WGMA turns its attention to the particular. The tariffs of Galveston Wharves, Corpus Christi and Orange define wharfage as "a charge assessed against the cargo or vessel."[49] However, it is other provisions of those tariffs

46. Ex. 65; Tr. 1386, 1640, 1690.

47. Ex. 65; Tr. 1397, 179-1794.

48. WGMA's proposed finding No. 5.

49. Each of those ports utilizes the 46 CFR 533.6(d)(2) definition of wharfage, *supra*, verbatim. The definition of wharfage in Galveston Wharves Tariff, *supra*, Item 5(t), p. 5 and Corpus Christi Tariff, *supra*, paragraph 3, p. 3A, appear in Appendix A, hereto. The definition in Orange Tariff, *supra*, Item 10, p. 4, does not appear in Appendix A.

which delineate responsibility for payment. WGMA asks for an overall finding as to these three ports that "but by other of their tariff provisions the wharfage charge is one imposed on cargo interests alone rather than on vessels (with the exception of Corpus Christi)." As to Orange, WGMA asks for an additional finding that "in the face of the tariff language making wharfage a charge against cargo, the tariffs of some of the respondents[50] impose responsibility for payment of this cargo charge on the vessel and its agent."

(a) Orange. It is correct to say that at this port wharfage charges are made the liability of the cargo owner or cargo agent.[51] However, I find no support for the statement that in the face of that kind of tariff provision, Orange imposes liability for this cargo charge on the vessel and its agent. Orange Tariff Item 120, cited by WGMA for support, does not convert liability from cargo interest to vessel interest. It deals with payment of charges by the person billed and does not attempt to change liability or responsibility for payment of wharfage charges.[52]

(b) Corpus Christi. At this port, although wharfage is "due" from the cargo interests, the vessel interests,

50. WGMA includes Beaumont and Port Arthur in this statement.

51. Orange Tariff, *supra*, Item 130, p. 4.

52. The proposed findings submitted by WGMA do not cite any portion of the record as proof that Orange does, in fact, seek payment of wharfage from vessel interests under Item 120. The same charge is made by WGMA in its opening brief, but here, too, WGMA fails to cite the portion of the record it relies on. If, in fact, Orange does hold vessel agents liable for wharfage under Item 120 the evidence adduced by WGMA would seem insufficient to have warranted a defense which might have included such matters as custom and practice or other tariff provisions but which, under the circumstances of the proof proffered by WGMA, Orange chose not to offer.

including agents, "guarantee" and are "liable" to pay those charges whether or not collected by the vessel interests from the cargo interests. These tariff provisions reflect a long standing custom and practice by which steamship agents assure the port that they will be responsible for charges for port facilities and services furnished to vessels they represent.

(c) Galveston Wharves. The meaning to be attributed by WGMA's proposed finding that at this port the wharfage charge is one imposed "on cargo interests alone rather than on vessels" does not ring clear.[53] If the inference to be drawn is that all wharfage charges are made the liability of the cargo interest but that the port somehow converts the attachment of liability to the vessel interest, this is not a rational view of the evidence. Neither would it be a correct statement if it meant that some wharfage charges are made the liability of the cargo interest but are then converted into the liability of the vessel interests.

Briefly, with regard to wharfage at Galveston Wharves, these are the facts:

From at least 1911 until 1974, the payment of wharfage on all cargo was the responsibility of the vessel interests.[54]

Until 1969, the railroads serving the port absorbed wharfage charges. In accordance with its tariff, the port

53. WGMA cites Ex. 62 and Tr. 1760 as support for the statement. Ex. 62 is the direct testimony of the Deputy Executive Director of Galveston Wharves. At Tr. 1760 that witness was being cross examined by WGMA counsel. Neither of those two references nor any other evidence of record supports the proposed finding in its entirety.

54. Ex. 42, Tr. 1157-1158.

billed the steamship agents for wharfage. In turn, the agents collected the wharfage from the railroads and remitted to the port. This procedure proved satisfactory until the railroads cancelled wharfage absorption, "unlawfully," in 1969, then, "lawfully," effective May 1, 1971. Difficulties and delays in the collection of wharfage (by steamship agents from cargo interests and by the port from the agents) resulted from the termination of wharfage absorption by the railroads.[55]

A series of meetings were held in 1973 and 1974 between representatives of Galveston Wharves, steamship agents, freight forwarders and customhouse brokers. The purpose of these meetings was to develop a more workable system for the collection of wharfage.[56]

The meetings between the Galveston port interests resulted in the adoption of a new procedure for collection of wharfage which became effective on October 15, 1974, by an amendment to the Galveston Wharves' tariff.[57] The amendment reads:

> Vessel owners and their agents whose vessels receive or discharge cargo while moored to a pier, dock, or wharf, thereby contract to pay the applicable wharfage charges thereon, except as provided in Notes A, B and C.[58]

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55. Ex. 62.

56. *Id.*

57. Ex. 43; Local Tariff No. 27-E, Item 170(c) at Ninth Revised p. 12.

58. Exs. 43 and 43a. Both Notes A and B relate to special situations not here involved. Note A dealt with Pier 38 cargo, only, and was later canceled. Note B deals with transshipped cargo, only.

Note C reads:

> Outbound wharfage on cargo other than cotton and cargo in containers will be invoiced to shipper or owners of cargo or his agent and are due and payable by that party responsible for forwarding of cargo through this port.

The procedure adopted in 1974 took into consideration the fact that the port booked and unloaded the majority of outbound cargo, except cotton and containerized cargo. The longstanding practice of holding vessel interests, including agents, liable for outbound cotton and containerized cargo, as well as all inbound cargo, was continued.[59]

(d) Beaumont and Port Arthur. Earlier in n.50, *supra*, I pointed out that WGMA charged Beaumont and Port Arthur, as well as Orange, as ports which make vessel agents liable for payment of wharfage "in the face of tariff language making wharfage a charge against cargo."

At Beaumont, " 'Wharfage' is a charge on cargo passing over, under, or through a wharf; . . ."[60] The definition at Port Arthur is substantially the same—" 'Wharfage'

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59. Ex. 62. As users, steamship agents consent to the wharfage provisions of the tariffs and agree to pay all charges specified in the tariffs as vessel interest charges. See notes 8 and 9, *supra*. Similar or identical consent provisions are common at United States ports. Cf. tariffs of Brunswick, Georgia; Wilmington, North Carolina; Jacksonville, Miami, Palm Beach, Port Everglades, Tampa, Panama City and Pensacola, Florida; Mobile, Alabama; Pascagoula, Mississippi; New Orleans and Baton Rouge, Louisiana; Bay City and Port Lavaca, Texas; Boston, Massachusetts; Anchorage and Kodiak, Alaska; San Diego, Redwood City, and Sacramento, California; Astoria, Bandon and Portland, Oregon; Anacortes, Kalama, Longview, Olympia, Port Angeles, Seattle, Tacoma, Vancouver, Bellingham and Everett, Washington. Ex. 41.

60. Beaumont Tariff, *supra*, Item 15-A, p. 5 (not shown in Appendix A).

is a charge on cargo passing over a wharf or discharged into water over shipside while vessel occupies berth at wharf. . . ."[61]

Thus, WGMA is correct in saying that these tariffs, like so many of those previously examined, make wharfage a charge assessed on (or against) cargo. However, WG MA is definitely not on the right track in implying or saying that there is a conflict or contradiction in terminology or result, if a charge against cargo is made the economic responsibility of the vessel interests.[62] It is well settled law that no such conflict exists and that no ambiguity exists in a tariff which by one tariff provision defines a terminal facility or service charge as a charge assessed against cargo and which by another tariff provision makes that charge the liability of the vessel agent. In a case in which one of the issues was whether the steamship agent could be held liable under a consent provision in the tariff for pier demurrage which was defined as a charge assessed against the cargo but which charge was made the liability of the vessel interests under another tariff provision, the court held, *The City of Galveston v. Kerr Steamship Co., Inc.*, 362 F.Supp. 280, 293-294 (S.D. Tex. 1973), aff'd 503 F.2d 1401 (5th Cir. 1974), cert. denied 420 U.S. 975 (1975):

> Defendants refer to the Item #5 definition of pier demurrage as "a charge assessed against cargo re-

61. Port Arthur Tariff, *supra*, Item 15, p. 4 (not shown in Appendix A).

62. At Beaumont, wharage charges are payable by the steamship agents under Item 115-c, p. 7 of Beaumont's Tariff, *supra*. At Port Arthur, with certain exceptions, wharfage on inbound cargo is the liability of the seamship agents and on outbound cargo it is the liability of the cargo interests under Item 120, pp. 7-8 of Port Arthur's Tariff, *supra*.

maining in or on the terminal facilities after the expiration of free time unless arrangements have been made for storage." Defendants also point to other charges which are charged against the vessel. Defendants conclude that these definitions preclude plaintiff from charging vessels or vessel agents with pier demurrage.

The definitions only deal with the manner in which charges are accrued. They do not purport to establish which parties are liable for the charge. Liability for the various charges is fixed by Item #30 of the Tariff, quoted in Finding of Fact 1. Items #5 and #30 are neither conflicting nor ambiguous.

(e) Brownsville. The definition of wharfage at Brownsville is the same as the definition at Port Arthur. Therefore, it is a charge on cargo. However, the tariff provision defining wharfage does not appear in Appendix A. Consequently it is not considered as having been placed in issue by WGMA. Therefore, on the premise that Brownsville was not being called upon to defend its wharfage tariff provisions or practices no findings concerning liability for wharfage or wharfage payment practices at that port should be made.[63]

6. Next, WGMA singles out PHA for proposed findings concerning that port's wharfage practices. It asks that there be findings that at PHA wharfage is clearly the liability of the cargo interests and, that while PHA's billing practices varied over the years, prior to July 1,

63. All that WGMA says in its proposed findings on liability is that Item 110, p. 100, of Brownsville's Tariff is ambiguous. WGMA then cites the language it believes to be ambiguous. The language cited, however, does not refer to vessel charges—only cargo interest charges. Moreover, neither in brief not in proposed findings does WGMA cite any portion of the record to show whether Brownsville seeks payment for wharfage from the vessel agents.

1975, the port billed wharfage to cargo agents.[64] WGMA also asks for some specific findings concerning the degree of difficulty and delay encountered by PHA in billing the cargo interests.

WGMA's purpose in requesting those findings is not clear because it is by no means certain whether WGMA intends the specific findings to relate to circumstances before July 1, 1975, or afterwards. Also, neither is the request precise as to the time period envisioned by WGMA.

Nevertheless, it would be inappropriate to make any findings in this proceeding concerning wharfage at PHA, for two reasons. One, it was not placed in issue by the complaint.[65] Two, PHA Tariff Amendments effective July 1, 1975, which made collection and payment of wharfage charges the liability of vessel interests, including agents, were the subject of a separate complaint proceeding, brought by WGMA, alleging that the amendments violated sections 15 and 17 of the Shipping Act. It was decided in that case that the amendment did not violate sections 15, 16 First or 17. *WGMA v. PHA, supra.*

7. Conceding that the evidence of wharfage billing practices at the other ports is less detailed than the testi-

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64. On outbound shipments the cargo representatives is usually a freight forwarder, a person licensed by the Commission pursuant to section 44 of the Shipping Act, 1916, 46 U.S.C. 841b. On inbound shipments the representative is usually a customs broker, who is not subject to regulation by the Commission. Licensed freight forwarders may, under specified conditions, be compensated by vessel and cargo interests, both, for the same shipment. See unnumbered section preceding section 2 of the Shipping Act, 1916, 46 U.S.C. 801 and section 44(e).

65. The PHA tariff provisions placed in issue appear at Appendix A, pp. i-iii. Wharfage provisions are not included.

mony about those practices at PHA, WGMA proposes no such findings for Beaumont, Brownsville or Orange, and only sketchy findings for Corpus Christi, Galveston Wharves and Port Arthur.

(a) Corpus Christi. Based upon testimony of the Dix witness,[66] WGMA proposes a finding that "the port bills agents for wharfage and seeks to hold them liable, Tr. 28, even though it knows the representatives of cargo interests at the port know their principals and therefore have the ability to collect the cargo charges, whereas the steamship agents do not have such knowledge or access. Tr. 28-29." While the meaning and implication of that part of the sentence after "Tr. 28" is somewhat obscure, opinion testimony of the Dix witness suggests that it means that ports are in a "better position [than vessel agents] to know the forwarders and brokers."[67]

It is not disputed that Corpus Christi bills steamship agents and seeks to hold them liable for wharfage, but the port objects to the rest of the sentence in part because it is unsupported by the record and, in other part, for inaccuracy.

There is no reliable evidence to support a finding that the port knows what the cargo interests know, but even if it were assumed to be a fact, the presumption would not lead to a finding that ports are better positioned than steamship agents to know the cargo representatives for a particular shipment at Corpus Christi.[68] On the other

66. The Dix witness was on the stand from Tr. 20 through Tr. 119.

67. Tr. 92.

68. Testimony by the Dix witness that Corpus Christi solicits the cargo was ordered stricken. Tr. 92.

hand there is evidence that Dix books cargo for its vessels with the cargo representatives,[69] and, of course, Dix also collects freight revenues for a liner principal from cargo interests. However, the overriding fact, according to WGMA's own witness, is that it is the contractual arrangement between the cargo and the ship which is the "determining factor in the assessment of [wharfage] charges" and there is no evidence that this contract, which even the agent must obtain from one of the two contracting parties,[70] is ever made available to the port.

(b) Galveston Wharves. After again noting that the practice of billing for wharfage at this port has varied, WGMA seeks a finding that "the port has on occasion sued steamship agents for wharfage, *as well as suing cargo interests (and railroads)*" (emphasis supplied), without further explanation of the time or circumstances involved.

It is difficult to understand the relevance or materiality of this proposed finding unless WGMA means that an inference be drawn that despite tariff provisions making the steamship agent liable for wharfage, Galveston Wharves indiscriminately sought to collect from the cargo interests as well. In any event, neither on its face nor by way of inference is the italicized portion a correct reflection of the record.

WGMA cites the following portions of the record to support the finding: Tr. 1762-1763, 1858; Exs. 36 and 62.

The matter of the suits was introduced first by Ex. 36, the prepared direct testimony of an officer of Strachan Shipping Company, a steamship agent and WGMA mem-

69. Tr. 52, 93.

70. Tr. 67-69. Cf. *WGMA v. PHA, supra,* 18 SRR 304 n. 19.

ber. In the exhibit are references to two court actions brought by Galveston Wharves for unpaid outbound wharfage, which, at the time, were the responsibility of the vessel interests. The exhibit stresses that it was Strachan which was sued, as vessel agent, and that Strachan later impleaded others. Exhibit 62 confirms this fact. It is reconfirmed at Tr. 1762-1763, 1858, on cross examination by WGMA of the Galveston Wharves official who sponsored Exhibit 62. Thus, there is no validity to the statement that the port sued "cargo interests (and) railroads."

(c) Port Arthur. This port has experienced no difficulty in collecting wharfage from cargo interests on outbound cargo. (It will be recalled that here the vessel interests are liable for inbound wharfage and the cargo interests are liable for outbound wharfage—see n. 62, *supra*).

8. In this and the next numbered paragraph of its proposed findings, WGMA moves on to the matter of wharf demurrage tariff provisions and billing practices. In this paragraph WGMA addresses the tariff provisions of all ports except Brownsville. In paragraph number 9, WGMA refers only to the ports of PHA, Galveston Wharves and Corpus Christi.

WGMA has no quarrel with the definitions of wharf demurrage in the respondents' tariffs. They are virtually identical and incorporate the authorized regulatory definition which provides, 46 CFR 533.6(d)(4):[71]

71. Only the Galveston Wharves Tariff provision, Item 5(k)(1), p. 4, appears in Appendix A. In their respective tariffs, the other respondents' wharf demurrage definitions appear at: PHA, p. 4; Corpus Christi, No. 5, p. 3A; Beaumont, Item 20, p. 5; Port Arthur, Item 20, p. 4; Orange, Item 20, p. 4.

> Wharf demurrage: A charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage.

As with the definition of wharfage, the definition of wharf demurrage deals only "with the manner in which charges are accrued." It does "not purport to establish which parties are liable for the charge." *The City of Galveston v. Kerr Steamship Co., Inc., supra.*

However, the proposed findings do not cite or quote from any of the tariff provisions of the respondents which place responsibility on the vessel interests for payment of wharf demurrage except to quote a part of a tariff provision published by PHA.[72] The provision quoted relates to outbound wharf demurrage.[73] As pertinent, it provides (portion in italics was omitted from WGMA's proposal):

> Outbound Cargo—Wharf Demurrage Charges *will be assessed to the cargo owner or authorized agent, except on cargo cutback or* held on the wharves for convenience of vessel's owner or agent, the charges will be assessed to the vessel or its agent.

WGMA states it has no complaint against this type of tariff provision which holds vessel interests "liable for wharf demurrage accruing by reason of actions of the vessels, such as where cargoes could not be lifted when

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72. This provision does not appear in Appendix A. In its opening brief WGMA also cited Item 185(c), p. 16-A of Galveston Wharves Tariff, *supra.*

73. PHA's tariff provision dealing with inbound demurrage appears at Item 3(c)(4) at p. 14. It provides "Inbound Cargo-Wharf Demurrage Charges will be assessed to the owner of the cargo or his authorized agent, to whom the invoice will be sent."

booked by reason of the failure of vessels to meet their schedules." Its complaint is limited to holding steamship agents liable (and here WGMA's combined position statement and proposed finding becomes somewhat obfuscated) "for collection and payment of these charges owed by cargo, which should be billed to and collected by the cargo representatives, i.e., freight forwarders and custom house brokers if not collected directly from shippers and cargo consignees themselves."

Taken literally, this means that WGMA is not pursuing a claim that the Shipping Act is violated by a port which holds vessel agents responsible for payment of wharf demurrage charges incurred by acts of their principals. Thus, the position statement appears to mean that WGMA is assailing wharf demurrage charges imposed by tariffs on the steamship agent where the tariff places liability for payment on the cargo interest. However, WGMA neither quotes nor cites any tariffs of the latter kind. In fact, the only wharf demurrage liability provision referred to in this paragraph and appearing in Appendix A, and therefore in issue, is that of Galveston Wharves in Item 185(c). p. 16-A.

At Galveston Wharves, wharf demurrage on inbound cargo is the responsibility of the cargo interests. On outbound cargo it is the responsibility of the vessel interests (without regard to fault of vessel or cargo). The difference in responsibility between inbound and outbound cargo is based upon the respective legal responsibilities for removal of cargo from the terminal. On inbound cargo the responsibility for removal after the expiration of free time is on the cargo interests. On outbound, the responsibility for removal after expiration of free time is

on the vessel, even though the fault may lie with the shipper interests. (The circumstances of delay are usually matters known only to the cargo and vessel interests and the ports are not privy to those facts).[74] These responsibilities are derived from the vessel's basic obligation to provide wharfage space for shippers to assemble outbound cargo and to pick up inbound cargo, an obligation acknowledged by a WGMA witness, Tr. 915.

Even if the combined position statement and proposed finding were not taken literally, WGMA's cause is not advanced. Should WGMA's position be considered an assault on tariff provisions which make wharf demurrage the liability of steamship agents, no findings can be made with respect to the ports of Port Arthur, Orange or Beaumont (Brownsville was specifiically excepted by WGMA) because their wharf demurrage liability tariff provisions were neither quoted nor cited nor do they appear in Appendix A. To make findings as to those ports would deprive them of notice and opportunity to be heard.

Corpus Christi presents a somewhat different situation. Although WGMA does not refer to this port's tariff provision concerning wharf demurrage, directly, Item 15 of Corpus Christi's tariff does appear in Appendix A. It

74. Tr. 454A, 455, 949-952, 1203, 1205; Ex. 62. The fact that PHA's tariff made outbound wharf demurrage occasioned by fault of the shipper the liability of the cargo interests does not necessarily raise questions concerning the legal liability theory, for whether the port collects from vessel or cargo interests, "The charge will be borne by the ultimate beneficiary of the services." *Cargill, Inc. v. F.M.C.*, 530 F.2d 1062, 1068-1069 (D.C. Cir. 1976). Moreover, none of the ports were called upon to defend against charges that there might be a violation of the Shipping Act because they made outbound wharf demurrage the liability of the cargo interests. Therefore, it is not known whether other acceptable tariff considerations might have led to provisions such as those in the PHA tariff.

seems to make all wharf demurrage, including inbound, the responsibility of the vessel interests. If this were a fact, there would arise a question of the propriety of a tariff provision making vessel interests liable for what is undisputably not a vessel responsibility at law. However, there is nothing to indicate that WGMA made inbound wharf demurrage an issue in this proceeding and, of course Corpus Christi was neither placed on notice nor given an opportunity to defend against that kind of allegation. Consequently Corpus Christi must be treated as occupying the same position as Port Arthur, Orange and Beaumont insofar as inbound wharf demurrage is concerned.

9. Generally, the relevance, materiality or other significance of WGMA's proposed findings about wharf demurrage billing practices at PHA, Corpus Christi and Galveston Wharves is obscure. Although the purpose in having these findings made is difficult to fathom, it might be conjectured that WGMA means to have it appear that it would be as convenient to hold agents for cargo interests liable for outbound wharf demurrage as it is to make agents for vessel interests liable for those charges. If this be so, it would seem to be an implicit, but contradictory, element of WGMA's theory that agents cannot be made liable for obligations of their principals, that somehow, agents for cargo are not as immune from liability under terminal tariffs as are agents for vessels. In addition to these general defects, the accuracy of some of the proposed findings is questionable.

(a) PHA. An additional problem with the proposed findings for this party is that WGMA does not make it clear whether it is seeking findings for the pre or post July 1, 1975, period.

These findings can be made. It is not disputed that before July 1, 1975, PHA billed freight forwarders and customs brokers for wharf demurrage.[75] PHA was able to do so because, in the case of freight forwarders, their names appeared on the copy of a document from which the port prepared another document permitting the cargo to be brought to the dock. It is undisputed, too, that on inbound cargoes, PHA obtained the information needed to issue wharf demurrage bills from ship's manifests and statements of cargo furnished by steamship agents or similar documents examined by PHA's clerks at vessel agents' offices. The reason for the office examination was the agent's tardiness in furnishing the necessary documents to PHA. PHA billed the vessel interests for wharf demurrage for cargo cutback by act of the vessel. It would bill the cargo interests if the cutback was for the convenience of the shipper, but, because it was rarely advised by the vessel interests why the cutback took place, PHA perceived it to have been caused by the vessel and billed accordingly. Ex. 55.

WGMA asks that it also be found that delays in receiving wharf demurrage billings (on cargo perceived to be in demurrage status because of the act of the vessel interests) were often very great so that it was impossible for the wharf demurrage to be collected (presumably by the agents from vessel owners, operators or charterers). While the testimony is more or less evenly balanced concerning the cause of delayed demurrage billing by PHA (sometimes the fault of the agent and other times the fault of the port), there is no showing whatsoever, for

75. Freight forwarders on outbound and customs brokers on inbound.

a finding "that it was impossible for the wharf demurrage to be collected" by vessel agents.[76]

(b) Corpus Christi. WGMA proposes findings virtually the same as those discussed and rejected at finding number 7(a) relating to the practice of billing agents for wharfage. The reasons for rejecting those proposals here are even stronger because the Dix witness, whose testimony is again relied upon by WGMA to support wharf demurrage findings, did not testify to wharf demurrage practices at all at the record references furnished by WGMA.

(c) Galveston Wharves. Essentially WGMA proposes findings that at this port the billing practices follow the tariff provisions. The findings made at paragraph 8 are sufficient and are incorporated herein by reference.

Crane Rental/Stevedore's Liability for Operator's Negligence

10. This paragraph concerns crane rental tariff provisions for port furnished cranes at PHA, Galveston Wharves and Corpus Christi[77] and the effect of those

76. The evidence relied on by WGMA is Ex. 33; Tr. 912-914. Ex. 33 is the prepared direct testimony of an Hellenic Lines official; the transcript references are to additional direct testimony of this witness. At PHA, Hellenic Lines is an "operator" of vessels and not an agent. Tr. 914-915. Moreover, it is very difficult to accept this witness' view that delay in billing by PHA makes collection of wharf demurrage impossible, since it is Hellenic Lines' records, alone, which form the basis for wharf demurrage billing. In other words, Hellenic knew, before PHA could find out, that wharf demurrage had accrued, but apparently failed to act promptly, if at all, to collect the demurrage from the cargo interests. The blame for this carrier's administrative inefficiency can scarcely be laid on PHA.

77. Portions of WGMA's proposed findings concerning crane rentals at Port Arthur, Brownsville, Beaumont and Orange will not

provisions on stevedore members of WGMA which use those cranes. The tariff provisions at the three ports are not identical but they do contain essentially similar terms and conditions. Not all of the terms and conditions are under attack—only those which make the using stevedore liable for the negligence of the crane operator, a person furnished by the port and usually a port employee.

Generally, the tariffs[78] provide: that cranes rented from the ports will include a crane operator paid by the port although the port will charge the user for the operator's services; that, in engaging the operator and paying for his services, the port acts as agent for the user; that, when using the port's crane, the operator will be under the direction and control of the user; that the operator is considered the servant of the user; that the port makes no warranties regarding competency of the operator and that the user must satisfy himself in this respect; and, that if the crane is negligently operated under the control and direction of the user, the user assumes full responsibility for the negligent operation, including the operator's negligence.

The need to rent shore based cranes arises if the ship's gear is inadequate to load or unload the vessel and if the

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be considered because those ports' tariff provisions treating with crane rentals were not mentioned in the complaint nor were they otherwise placed in issue on the question of the crane operator's negligence. Ex. 49, p. 36 of Port Arthur's tariff was received in evidence. Item 605-A on that page refers to privately owned cranes used at that port but contains no references to port cranes.

78. PHA tariff, *supra*, Item No. 15, p. 22; Galveston Wharves tariff, *supra*, Item No. 105, p. 9; Corpus Christi tariff, *supra*, Item Nos. 125, 130, 135, p. 11. Corpus Christi's tariff provisions do not appear in Appendix A, but no objection was raised because of their absence therefrom. These tariff provisions are contained in Ex. 51.

particular stevedoring entity does not itself own suitable equipment. Cranes may be rented from the ports or from private sources, subject only to a "first call" privilege which requires "stevedores to select a [port] crane *only* if that crane is 'suitable for the job in the judgment of the stevedore in terms of size and expense as any available crane'."[79] As a practical matter, however, at Galveston Wharves the port's cranes ordinarily are rented because local private rental cranes are too small and the cost of renting and transporting larger cranes from more distant locations is more expensive than renting from Galveston Wharves.

WGMA proposes a finding that in contrast to the negligence provisions of the ports' tariffs, "where cranes with operators are rented from private concerns there is no agreement that the renting stevedore will be liable for the crane operator's neglignce," citing the testimony of a WGMA member operating as a stevedore at PHA and Galveston Wharves.[80]

The WGMA witness related that his firm rents cranes from some private concerns as well as from the ports but

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79. There is evidence of record showing that PHA imposed limitations on rental of cranes from private sources stricter than the "first call" privilege when PHA's cranes were available. These preferential practices at PHA were the subject of a separate complaint proceeding and were there found unlawful under the "first call" test enunciated by the Commission in that proceeding. PHA was ordered to cease and desist from those practices and to file appropriate tariff amendments to reflect the Commission's decision. *Perry's Crane Service v. Port of Houston Authority, of Harris County, Texas,* 16 SRR 1459 (1976) Initial Decision, _____ SRR _____ (1977) (not published) Commission Decision, partially adopting Initial Decision.

80. WGMA cites Tr. 1034-1035, 1063-1064, 1074-1075. The witness stated that all rentals from private concerns were reached orally and that a search of his records showed no written leases.

that there is no agreement between his firm and particular private rental companies regarding operator negligence when an operator is furnished. This does not mean that the private rental companies have agreed to be liable for their employees' negligence—for the real point of the testimony is that there is no meeting of the minds on the subject of responsibility for negligence. In the witness' own words, "It's an unspoken agreement, I guess."[81]

There is other and more convincing evidence to show whether private concerns rent cranes with operators under the same terms and conditions as do the ports. They do. Exhibit 63 contains 19 sample crane rental and lease agreements obtained from private concerns listed in the Houston Yellow Pages. Specimen agreements of those firms which furnish operators with cranes contain provisions similar in effect to the language contained in the ports' tariffs relating to the transfer of liability for operator negligence.

Both WGMA and the respondents agree to many facts concerning crane rentals. They agree that it is a common practice for all crane equipment owners to lease them with operators because the equipment is very expensive, highly complex and technical and requires skilled operators for the protection of the equipment and safety to others and sometimes because of labor agreements.[82] They agree that if a crane were to be rented without an operator, it would be difficult for the crane owner to be certain that the operator, unknown to him, would be skilled and

81. Tr. 1035. It was suggested to the witness that perhaps there was a "custom and tradition of the trade" which might control. His answer was another guess. *Id.*

82. Tr. 90, 733, 980 (WGMA); Tr. 1486, 1862 (Respondents).

competent.[83] Significantly, they agree, too, that when a crane is rented the using stevedore has supervision and control of the crane and its operator and directs the operation of both because the crane operator cannot see into the hold of a ship and must rely upon directions given by a stevedore employee when operating the crane.[84] At least one WGMA witness acknowledges that even without a lease provision requiring it he would accept responsibility for damage caused because the "gangway" man, a stevedore employee, gave bad or erroneous signals to the operator.

Last, WGMA asks for findings that "stevedores have had to pay large sums when the crane operators furnished by the port have themselves been negligent . . . And liability for the crane operators actions increases the stevedore's insurance costs."

For the proposition that stevedores have had to pay large sums of money because of operator negligence, WGMA relies on the testimony of one stevedore witness who, on direct testimony, offered the opinion that on two occasions he paid for cargo damage because of the operator's negligence.[85] He thought that the two claims totaled in the neighborhood of $5,500.[86] On cross examination he stated that one of the two accidents occurred because the brakes failed but he also admitted he had no way of knowing what caused the accident. Another example of the payment of money was furnished by

83. Tr. 227 (WGMA); Tr. 1487, Ex. 53 (Respondents).

84. Tr. 96, 227-230, 1065 (WGMA); Tr. 1331, 1480, 1743, Ex. 53 (Respondents).

85. Tr. 1025.

86. Tr. 1028.

another stevedore who testified "An instance in which such a tariff provision has been highly detrimental to my company is Rorie v. City of Galveston [*supra*], in which the court held that where the Galveston Wharves' tariff provided that the hoist operator was to be under the direction of the lessee and was to be considered as agent or servant of the lessee, the hoist operator was the 'borrowed servant' of the stevedore at the time of the accident." The amount of damage paid by this witness' employee was not furnished.

For the proposed finding that the tariff provision increases the stevedore's insurance costs, WGMA relies solely upon the testimony of and evidence introduced through K. S. Trostmann,[87] Comptroller of Texas Transport and Terminal Company, an agent and stevedore.[88] The proposed finding is diametrically opposed to the evidence.

In prepared direct testimony, Mr. Trostmann said that his firm rented cranes with operators on numerous occasions from PHA. The lease was subject to the negligence provisions of the tariff. He concluded, "In my opinion such arrangement is both unfair and illegal in that it enables the Port to evade liability for its own employee's negligence and substantially adds to our cost of doing business."[89] The witness meant by this that his firm's liability insurance premium is greater when cranes are rented with operators than when rented without operators furnished by the port.

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87. WGMA cites Tr. 738 and Ex. 16 as authority for the proposed finding.

88. Texports Stevedoring Company, an affiliate, is the stevedore.

89. Ex. 14.

However, skillful cross examination of this witness demolished the conclusions expressed on direct examination and firmly established that the stevedore's overall insurance costs were reduced rather than increased by "such arrangement."[90]

Answers to questions on cross-examination demonstrated that even though the liability premium was higher for cranes with operators than for cranes without operators, there was an overall insurance savings to Texports because the stevedore incurred no expense for workmens' compensation insurance which has a much higher rate and total premium than the rate and premium for liability insurance for cranes with operators. Moreover, the stevedore is not liable for social security payments for operators who are furnished with cranes but who remain on the ports' payroll. Thus, on this record there is nothing to warrant a finding that a stevedore's overall insurance costs or costs of doing business, for that matter, are increased because of the ports' crane rental tariff provision. On the other hand there is clear and convincing evidence that there are substantial savings to stevedores' cost of doing business in spite of (indeed, because of) the operator becoming the "borrowed servant" of the using stevedore.

One other factor should not be overlooked in this "arrangement." Because of the expense of crane rentals, stevedores do not like to keep the cranes idle during an operator's time off. Usually, then, an extra operator is provided at the request of the stevedore by the port thereby further increasing the stevedore's savings on insurance and social security.

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90. Tr. 731-737; see also Appendix to Respondents' Joint Brief, Appendix D.

Interpretation of Tariff

11. For the next proposed finding of fact WGMA assails "provisions of respondents' tariffs which reserve to themselves or give to themselves, the right to interpret their tariffs and which state that use of the port facilities constitute consent to be bound by all of the tariff provisions, the two sets of provisions when taken together being allegedly oppressive, unfair, and unreasonable and therefore unlawful since by use of the facilities the agents (or their principals) would subject themselves to whatever interpretation of the tariffs the ports might make."

The language of the "use" or "consent" provisions may differ slightly from tariff to tariff, but, in effect, each respondent says the same thing—that use of the port facilities constitutes consent to all the terms and conditions of the tariff. The "consent" provisions were identified at n. 8, *supra*.[91]

The "interpretation" provisions of the respondents' tariffs are not all the same. Galveston Wharves does not have that kind of provision in the portion of its tariff appearing in Appendix A, nor was any such tariff provision referred to in the record.

Of the remaining ports, all, except PHA, have tariff provisions making the port the sole interpreter or judge of its own tariff.[92] PHA merely "reserves the right to

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91. WGMA's proposed finding fails to cite Corpus Christi's "consent" tariff provisions. Its all inclusive "consent" appears in Item 52. A more limited "consent," applicable, as here pertinent, to wharfage and wharf demurrage appears at Item 15.

92. Beaumont tariff, *supra*, Item 100, p. 7; Port Arthur tariff, *supra*, Item 105, p. 6; Corpus Christi tariff, *supra*, Item 52; Brownsville tariff, *supra*, Item 115, p. 100; Orange tariff, *supra*, Item 115, p. 9.

interpret the provisions of this tariff."[93] The provisions of Beaumont's and Port Arthur's tariffs go even further than the others. They both provide that "The Port Authority is not a common carrier and is sole interpreter of its tariff rules and regulations."

WGMA seeks no finding (and refers to no part of the record to establish) that any port has used the combination of the "consent" or "use" and "interpretation" provisions of its tariff unfairly against any agent or principal. However, this finding does not mean that any port's tariff which states, or is susceptible of being understood to mean, that the port is the arbiter of an unclear or ambiguous tariff provision is fair.

12. For its last finding against a respondent, WGMA repeats its contention concerning the Galveston Wharves "tariff provision assessing pier demurrage during strikes according to the free time status of cargo when strike interference commences, i.e., if cargo has free time remaining, the strike interference time will not count against free time; if cargo has used its free time and penalty demurrage time is running, penalty time will continue to run but at a different rate, the complainants contending that since all cargoes are in exactly the same status on the docks where handling is prevented by a strike they should be treated in the same fashion."

I find that WGMA has stated the substance of Galveston Wharves' strike demurrage tariff provision, Item 187 "Interference Due to Strikes," *supra,* and further find that WGMA has stated its contention concerning that tariff provision as a proposed finding of fact.

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93. PHA tariff, *supra,* Item 2, p. 12.

WGMA also asks for a finding that Maryland has a tariff provision which grants or extends free time to all cargo during a strike period.[94] The respondents seek to distinguish the Maryland tariff provsion by stating that it merely extends free time because of strikes of its own labor. Maryland Port Administration did not respond to this proposed finding. No useful purpose is served by deciding which side is correct. It is sufficient to find that the two tariffs are different.[95]

13. WGMA also requests that certain findings be made in connection with intervenors, New Orleans, California and Maryland. Except to the extent that certain findings are made herein concerning those intervenors, the proposed findings are rejected because they serve no useful purpose in determining whether the respondents' tariff provisions and practices in issue in this proceeding are lawful.

Discussion and Conclusions

Category I

Vessel Agents' Liability for Payments of Vessel Charges

A: General

As explained before, a post hearing conference was held for the express purpose of determining whether any party wished the opportunity to have the record reopened for additional evidence or to submit supplemental briefs.

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94. Maryland Port Administration Terminal Services Tariff No. 2, FMC-T No. 3, Section IV. (4), p. 10, Ex. 61.

95. WGMA calls the Maryland tariff provision "noteworthy." It is merely different.

This approach was appropriate because the Commission's decision in *WGMA v. PHA* had recently been served. *WGMA v. PHA* was perceived to have had a strong influence on some of the issues in this proceeding—particularly those in Category I—because the decision upheld the validity of tariff provisions making wharfage charges the liability of the vessel and tariff provisions making vessels agents, as users, liable for payment of vessel charges. No request to reopen or to submit additional briefs was made.

B. Application of *WGMA v. PHA* to this proceeding

In *WGMA v. PHA*, as here, the complainant charged that particular port tariff provisions and practices implementing those provisions violated sections 15 and 17.[96] WGMA focused on the respondent's newly published tariff provisions which sought to hold vessels agents liable for wharfage charges. The new tariff provisions contained the following pertinent passage:

> * * * Wharfage Charges * * * are liabilities of the owner of the cargo; however, the collection and payment of same to the Port Authority must be guaranteed by the vessel, her owners and agents, and the use of Port Authority facilities by the vessel, her owners and agents, shall be deemed an acceptance and acknowledgement of this guarantee.

In *WGMA v. PHA*, WGMA made essentially the same arguments concerning the liability of vessel interests for

96. The complaint in *WGMA v. PHA* did not allege a violation of section 16 First, but WGMA's post hearing briefs did. On the issues in Category I—Vessel Agents Liability for Payments of Vessel Charges—the identical circumstances pertaining to section 16 First are present here.

wharfage charges as those WGMA advances here concerning the liability of vessel interests for wharfage and wharf demurrage charges. Also, in the cited case, WGMA asserted the same contentions concerning the liability of vessel agents for payment of vessel charges as those made here with respect to wharfage, wharf demurrage and dockage charges.[97]

Among other things, the Commission rejected WG MA's theories, holding that terminal tariffs are not agreements within the meaning of section 15; that tariff provisions making the payment of wharfage charges the liability of the vessel interests were neither unjust nor unreasonable and, therefore, were not in violation of section 17 because the carrier's obligation to the shipper requires it to provide terminal (wharf) facilities; and that tariff provisions making vessel agents liable for payment of charges (deemed to be proper vessel charges) also were not unjust and unreasonable, because the vessel agents, as users of the port's facilities, had separately agreed to be liable for the wharfage charges.

The conclusions in *WGMA v. PHA* subsume: that the word "assessed," as used in definitions contained in the Commission's terminal tariff regulations, 46 CFR 533 et seq., deals only "with the manner in which charges are accrued"; that the word "assessed" does "not purport to establish which parties are liable for the charges"; and that whether charges are assessed against cargo or vessel,

97. There is one major distinction. In *WGMA v. PHA* WGMA argued that making vessel agents liable for a particular vessel charge (wharfage) constituted duress under Texas law. WGMA does not make that argument here. In its place, WGMA raises a Texas Statute of Frauds issue which it did not do in *WGMA v. PHA*.

if the charge is a proper charge aganst the vessel it may properly be made the vessel agent's liability for payment."[98]

Patently the texts of the tariff provisions assailed in this proceeding differ in varying degrees from counterpart provisions held to be lawful in *WGMA v. PHA*. But there is no realistic substantive distinction between them.

For example, an examination of some tariffs' provisions relating to wharfage charges show this:

a. Corpus Christi's tariff provisions placing liability for payment of wharfage charges on vessels agents (Item No. 15) are worded somewhat differently than, but are nearly the same as those encountered in *WGMA v. PHA*, even to the extent that they make vessels agents guarantors of payment of charges due from the cargo interests;

b. Galveston Wharves' tariff provisions make wharfage "a charge assessed against the cargo or vessel" (Item No. 5(1)t), but also specify that vessels agents using the wharf "thereby contract to pay the applicable wharfage charges" (Item No. 170(c); see n.57, 58, *supra*, and related text);

c. Other respondents' tariffs use variations of the "user" and "consent" provisions[99] demonstrated in Galveston Wharves' tariff.

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98. See previous text references to these passages from *The City of Galveston v. Kerr Steamship Co., Inc.*, cited with approval in *WGMA v. PHA, supra*, 18 SRR at 315.

99. "Consent" provisions are "probably superfluous," *State of Isreal v. Metropolitan Dade County, Florida*, 431 F.2d 925, 927 (5 Cir. 1970). See also *Chr. Salvesen & Company, Ltd. v. West Michigan Dock & Market Corporation*, 12 F.M.C. 135, 136, 141 (1968), upholding the principle that use of a port facility constitutes "acceptance of the terms of respondent's tariff." See, also, *WGMA v. PHA, passim*, to the same effect.

Thus all the wharfage tariff provisions under attack here convey the same unequivocal message that wharfage charges are the liability of vessel interests and that vessels agents, as users of the ports' facilities, will be held accountable for payment of those charges. WGMA has failed to show by a preponderance of the evidence or by force of logic why wharfage charges in this proceeding should be regarded differently by the Commission in this proceeding than they were in *WGMA v. PHA*.

Insofar as dockage (shed hire or wharf use hire) charges are concerned, all of respondents' tariffs provide for assessment of dockage charges against the vessels and make the agents liable for payment. No one questions the propriety of treating dockage, etc., as a vessel charge. The argument made by WGMA is that dockage, etc., cannot be made the liability of the vessels agents. WGMA centers its argument on the definition of dockage in the Commission's terminal tariff regulations, which provide that dockage is "the charge assessed against a vessel for berthing at a wharf . . . ," 46 CFR 533.6(d)(1). Consequently, says WGMA, if dockage is defined as a charge "assessed" against the vessel, it cannot be made the liability of the agent. WGMA ignores the teaching of *WGMA v. PHA* and the many cases cited therein which uphold tariff provisions making agents liable, as users, for charges "assessed" against the interests they serve.[100]

Turning again to outbound wharf demurrage charges, as stated in the findings of fact, only the outbound wharf

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100. True, WGMA's brief was submitted before *WGMA v. PHA* came down. However, as shown, WGMA declined the opportunity to submit supplemental briefs, when offered, after *WGMA v. PHA* was decided.

demurrage tariff provisions and practices at Galveston Wharves is squarely in issue, although WGMA more remotely raises questions concerning the tariff of Corpus Christi and practices of PHA.

WGMA's arguments are the same it made in respect to wharfage in *WGMA v. PHA* and those it makes concerning wharfage charges here. The only real issue to be determined, then, is whether outbound wharf demurrage is a proper vessel charge As necessarily explained in the findings of facts (because of the way WGMA framed its proposed findings) outbound wharf demurrage is a proper charge against the vessel because of the vessel's undertaking to provide wharfage space to shippers for the assembly of outbound cargo and for removal of cargo from the terminal. It is therefore a charge reasonably related to the vessel interests' use of the facility and it is a reasonable charge to be borne by the vessels agents. See *The City of Galveston v. Kerr Steamship Co., Inc., supra,* 362 F.Supp. at 293-294; *WGMA v. PHA, supra,* 18 SRR at 315.

Neither the tariffs of Galveston Wharves or Corpus Christi[101] nor the practices of those ports or PHA with respect to outbound wharf demurrage are significantly different than equivalent tariff provisions and practices with respect to wharfage insofar as the relevant issues are involved.

Thus, it can be seen that any differences between the tariff provisions and practices placing liability for payment of vessel charges on vessels agents in *WGMA v.*

101. Although not referred to in WGMA's proposed findings on outbound wharf demurrage, Corpus Christi's tariff provisions in this regard (Item No. 15) are in issue.

PHA and the tariff provisions and practices placing liability for payment of vessel charges on vessels agents in this proceeding are neither substantive nor substantial. Underlying the tariffs and practices one fact stands out in both *WGMA v. PHA* and here. The ports look to the agents for payment of the wharfage, dockage and outbound wharf demurrage charges and the ports rely upon the agents' credit not the credit of the absentee vessel interests.

In short, WGMA has failed to show that any of the tariff provisions and practices imposing liability for vessel charges on vessels agents are unlawful or are excessive or are not reasonably related, fit and appropriate to the ends in view. *WGMA v. PHA, supra,* 18 SRR at 790. On the other hand, respondents have affirmatively demonstrated that vessels agents are, in fact, the users of the services and facilities for which they are charged and that the tariffs and practices are just, fair and reasonable and not in violation of sections 16 First[102] or 17. "A just and reasonable allocation of charges is one which results in the user of a particular service bearing at least the cost to the terminal of providing the service." *WGMA v. PHA, supra,* 18 SRR at 790.

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102. The comment made in *WGMA v. PHA, supra,* 18 SRR at 314 n. 34 is equally appropriate here:

> As stated earlier, section 16 First was not put in issue in the proceeding. Nevertheless WGMA argues that the tariff provisions are violative of its provisions, as an undue preference because the tariff shifts the burden of payment and collection of wharfage charges to vessel interests from cargo interest (payment) and PHA (collection). In essence, it is the same argument made by WGMA in regard to section 17. Neither section has been violated.

C: The Statute of Frauds

The Statute of Frauds argument made by WGMA is simple. It invokes Texas law[103] which declares unenforceable promises of one person to answer for the debts of another unless the promise is in writing and signed by the person sought to be charged. The essential weakness of this argument is that the Statute of Frauds is never brought into play. These tariffs, which make agents liable for payment of vessel charges, impose that liability directly on the agents as users[104]—and—having used the facilities provided by the ports, the agents accept the terms of the tariff. See n. 99, *supra.* Thus, none of the tariff provisions call for vessels agents to answer for the debt of another. The debt they pay is their own.

Moreover, the Commission has held that "while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not alone dispositive of Shipping Act issues, absent a showing that these principles directly apply to Shipping Act considerations." *WGMA v. PHA, supra,* 18 SRR at 791. WGMA has made no such showing here.

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103. WGMA cites section 26.01 of the Texas Business and Commerce Code.

104. The Commission's terminal tariff regulations require that the definitions of terminal services appearing in 46 CFR 533.6 be set forth in tariffs filed by the ports. Although the regulations allow for departures, it is not difficult to perceive the problems of the tariff writer in composing a definition different than prescribed. E.g.—how does one go about rephrasing a definition, such as the one for wharfage, which is set forth in the disjunctive ("cargo or vessel"), to make wharfage the liability of the vessels agents? Apparently, tariff writers have opted to achieve the result by retaining the definition and by adding other provisions, such as "consent," "user" or "guarantor" clauses to make the matter of liability clear.

D: Galveston Wharves' Strike Demurrage

Complainant has taken a rather curious stance in regard to the strike demurrage provision in Galveston Wharves' tariff (Item No. 187). At the outset, in describing the contentions of the parties I expressed the view that this tariff provision and the practices thereunder were assailed because the vessels agents were held liable for and were being billed for strike demurrage chargeable to the vessel. This is the only reasonable conclusion which may be reached from a reading of the complaint which alleges that this particular provision violates sections 15 and 17 of the Shipping Act.

Nevertheless, in its post hearing opening brief: complainant seems to have abandoned the allegations of the complaint because it makes no reference to the practice of holding vessels agents liable for strike demurrage charges; instead, complainant directs its fire against those provisions of Item No. 187 which differentiate between cargo in free time and cargo in penalty time; complainant asserts sections 16 and 17 were violated because Item No. 187 discriminates between types of cargo.

In attempting to make its belated point, complainant relies upon events which occurred in 1968-1969—the identical events which led to the court action in *The City of Galveston v. Kerr Steamship Co., Inc., supra.* (The defendants in the *Kerr* case were vessel agents and members of WGMA, 362 F. Supp. at 290). Complainant states:

> As a concrete example, during the 1968-1969 180-day strike, *no* demurrage during the strike period was charged cargo on free time when the strike commenced. All cargo whose free time had at that

> time run out was charged demurrage for each day of the 180-day period. Yet both kinds of cargo were in exactly the same situation: Neither could be moved, all were occupying space on the wharves and whatever protective services were afforded by the port were afforded to both kinds of cargo.

Complainant may be correct in its appraisal of the "situation," but the factors it relies upon to describe the situation are not really relevant. What is important is that the cargoes did not have the same status when the strike began—one was in free time and the other in demurrage.

This was the distinction recognized by Judge Noel of the United States District Court for the Southern District of Texas and formed the basis for his Memorandum and Order awarding judgment to Galveston Wharves against the defendants for strike demurrage charges for cotton shipments in a demurrage "situation" in *The City of Galveston v. Kerr Steamship Co., Inc.*

Apparently, Item No. 187 was written into Galveston Wharves' tariff as a direct consequence of the strike in 1968-1969 and the court proceedings which ensued. Before, during and after the strike many bales of cotton lay immobilized on the wharves. Under Item No. 185 of its then current tariff, Galveston Wharves allowed 15 days free time during which no charge would be made; afterwards there would be a demurrage charge at the rate of 2½ cents per bale per day for the first 5 days and 5 cents (penalty) per bale for each day thereafter until removed.

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105. At no point in this proceeding were the levels of rates in Item No. 187 placed in issue.

Unilaterally, Galveston Wharves took action to eliminate the penalty portion of the demurrage rate for the period of the strike and thereafter billed demurrage charges as follows:

1. Cargo on free time when the strike began remained at free time during the strike.

2. Cotton in demurrage status was charged 2½ cents during the strike.

3. Cotton in penalty demurrage status was billed at 2½ cents during the strike.

Judge Noel found the tariff provisions and practices and the action of Galveston Wharves rational, reasonable and nondiscriminatory. Item No. 187 generally reflects what Galveston Wharves did in 1968-1969. There is no evidence to show that any subsequent strike occurred since 1961 which would have caused Galveston Wharves to invoke the strike demurrage provisions of its tariff. But the passage of time has not made Galveston Wharves' actions and practices any less reasonable, rational or nondiscriminatory.

Moreover Galveston Wharves has conducted itself in a manner consistent with this Commission's policy. Since 1948, the Commission has not altered its view that, during a strike, penalty demurrage may not be charged but that compensatory demurrage shall be charged. *Free Time and Demurrage Charges—New York,* 3 U.S.M.C. 89 (1948). In that case the Commission emphasized, 2 U.S.M.C. at 107:

> The carrier is entitled, however, to fair compensation for sheltering and protecting a consignee's prop-

erty during the period of involuntary bailment and after expiration of free time.

It would be unreasonable to hold that the port is entitled to less for doing the same thing for property in a demurrage status. In fact, WGMA does not urge that Galveston Wharves is not entitled to compensatory demurrage. Therefore, the only conclusion to be reached is that WGMA is urging that cargo that was in free time when the strike began should be charged at compensatory demurrage rates. But WGMA has failed to explain and, indeed, leaves it to the imagination why this should be done, except by implying that this would somehow avoid discrimination in the same "situation."

Last, for the same reasons that wharf demurrage charges may properly be made the liability of vessels agents, so too may strike demurrage charges, which are really just another variety of wharf demurrage, be considered the liability of vessels agents.

E: Conclusion

I find that WGMA has failed to prove that any of the ports' tariffs or practices thereunder involving the charging of vessels agents with liability for payment of vessel charges, including wharfage, wharf demurrage, dockage, etc., and strike demurrage is in violation of sections 15, 16 or 17 of the Shipping Act, 1916. I further find that Galveston Wharves' strike demurrage tariff provision, Tariff Item No. 187, and the practices thereunder do not unduly or unreasonably prefer or discriminate against types of cargo, shippers, carriers, vessels or their agents in violation of sections 16 First or 17 of the Shipping Act, 1916.

Category II

Tariff Interpretation Provisions

The issue here is quite simple. Should tariffs be permitted to state explicitly or imply that only the port issuing the tariff may interpret its provisions?

The answer does not lie in the fact that there is no proof that any port has abused this provision or even that there is no evidence that any port has ever exercised the rights arrogated unto itself. Neither does the answer lie in the semantic argument made by respondents that "interpret" does not mean "construe" and that the ports were careful not to say that they reserved the right to "judicially construe" the tariffs to the exclusion of the courts or the Commission.

The answer does appear in the manifest infirmity of the provision itself. A need to interpret a tariff provision can exist only in the case of lack of clarity or ambiguity. But tariffs are required to be clear and unambiguous and if they do not meet that standard, the tariffs must be construed against the issuer—an event hardly likely to occur if the issuer is the interpreter. In his initial decision in *Matson Navigation Company v. Port Authority of Guam*, 18 SRR 45 (1978), adopted March 15, 1978, Chief Administrative Law Judge John E. Cograve explained, 18 SRR at 52:

> When dealing with the proper application of the definition of wharfage in a terminal tariff, the Commission in *Sacramento-Yolo Port Dist. v. Fred V. Noonan Co. Inc.*, 9 F.M.C. 551 (1966), laid down the following general principles:

> . . . It is a basic principle in the law of tariff construction that tariffs must be clear and unambiguous to avoid possible discrimination among users of tariff services. When a tariff is clear on its face, no extrinsic evidence may be used to vary its "plain meaning." Tariffs are, moreover, drawn unilaterally and must therefore be construed in the case of ambiguity against the one making and issuing the tariff, and "it is the meaning of express language employed in the tariff and not the unexpressed intention . . . which controls. . . ." *Aleutian Homes, Inc. v. Coastline Line*, 5 F.M.B. 602, 608. . . . (9 F.M.C. at 558) [*]
>
> *Although I have not found a case which specifically states that the same principles of construction apply to terminal tariffs as well as carrier tariffs, the *Sacramento* case, *supra*, and others make it clear that they do.

Conclusion

I find that the respondent ports[106] which publish tariff provisions purporting to allow the port to interpret provisions of the ports' tariffs are engaging in unjust and unreasonable practices relating to or connected with the receiving, handling, storing, or delivering of property in violation of section 17 of the Shipping Act. The violation may be cured and reasonable practices restored by deleting the offending provision from the tariffs.

Category III

Crane Rental/Liability of Stevedores for Operators' Negligence

The narrow issue presented is whether it is an unjust

106. As found, above, Galveston Wharves does not publish a tariff provision of the kind found to be offensive.

and unreasonable practice for ports[107] to rent cranes together with crane operators, in the employ of and paid by the port, to stevedores under tariff terms and conditions which require the stevedores to control and supervise the operators and to assume responsibility and liability for the negligent acts of the operators while the operators are under the stevedores' supervision. As explained previously, the practice of transferring liability for employee negligence from the employer to the user of the equipment is known in the law as the "borrowed servant doctrine." The doctrine has survived at least two tests in Texas, one in the State courts, *Rorie v. The City of Galveston, supra,* the other in the Federal Courts, *Southern S.S. Co. v. Meyners,* 110 F.2d 376 (5th Cir. 1940), certiorari denied, 311 U.S. 674 (1940). Both cases involved crane operators employed by ports and borrowed by a stevedore (*Rorie*) or equivalent (*Meyners*).[108]

WGMA argues that the tariff provisions are unconstitutional and void under State law and are invalid under Federal law.

In making its argument on State law, WGMA wholly ignores the *Rorie* case in its post hearing briefs.[109] One gets the impression that WGMA is using this forum to retry the principle of *Rorie* as if the *Rorie* case never existed.

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107. Only three ports port's practices are involved—PHA, Galveston Wharves and Corpus Christi.

108. Southern S.S. Co. used the dock facilities of PHA's predecessor, under the predecessor's tariff, to load and unload "its ships." 110 F.2d at 377.

109. Strachan Shipping Company was the borrowing stevedore in the *Rorie* case.

There were two major issues in *Rorie*. The first involved section 15. The second concerned the borrowed servant doctrine. On the section 15 issue, the stevedore defended on the theory that the tariff was void as it had not been approved by this Commission pursuant to section 15. On this issue the Court accepted the opinion expressed in the Commission's "Memorandum Amicus Curiae" that terminal tariffs, as such, do not need section 15 approval to be valid and enforceable. Nothing has been offered by WGMA which would warrant disturbing the principle espoused by the Commission and adopted by the Court in *Rorie*.

With respect to the borrowed servant doctrine, the Court found that under the tariff provisions for crane rental there involved (the instant tariff provisions are substantially the same) there was an effective transfer of control of the crane operator from the port to the stevedore. The Court explained the rationale, 8 SRR at 20,715:

> It is settled, of course, that a general employee of one person may become the special or borrowed employee of another employer. As we pointed out in Producers Chemical Co. v. McKay, Tex. Sup., 366 S.W.2d 220:
>
> > "Whether general employees of one employer have, in a given situation, become special or borrowed employees of another employer is often a difficult question, particularly when employees are furnished with machinery by their general employer to accomplish part of a project or contract undertaken by another. Solution of the question rests in right of control of the manner in which the employees perform the services neces-

> sary to the accomplishment of their ultimate obligation. If the general employees of one employer are placed under control of another employer in the manner of performing their services, they become his special or borrowed employees. If the employees remain under control of their general employer in the manner of performing their services, they remain employees of the general employer and he is liable for the consequences of their negligence.
>
> * * *
>
> "When a contract, written or oral, between two employers expressly provides that one or the other shall have right of control, solution of the question is relatively simple. . . ."

To the extent argued by the parties in *Rorie*, the court determined that the borrowed servant doctrine did not offend Texas law. This, then, is not the proper forum to re-try the issue of the validity of the borrowed servant doctrine under the Texas constitution or Texas law.

The question to be decided here is whether the tariff provisions embodying the borrowed servant doctrine are just and reasonable under Shipping Act provisions. In this respect, WGMA makes a more interesting argument, hinted at in its opening brief and fleshed out in its reply brief. It points to a general rule of law that common carriers or public service companies[110] cannot stipulate for immunity from their own or their agents' negligence. *United States v. Atlantic Mutual Insurance Company*, 343 U.S. 236, 239 (1952). WGMA invokes *Bisso v.*

110. "Because terminals are of vital importance to transportation, they may be deemed public utilities for purposes of regulation by this Commission." *WGMA v. PHA*, supra, 18 SRR at 309.

Inland Waterways Corporation, 349 U.S. 85, 90-91 (1955), for the rationale that:

> This rule is merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships such as bailors and bailees, employers and employees, public service companies and their customers. The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by other who have power to drive hard bargains. (Footnotes omitted.)

However, I do not find the rule in *Bisso* to be apposite to the facts of this case. Finding No. 10, *supra*, clearly shows no overreaching by those who have power to drive hard bargains.[111] The ports' practices are the same as those which exist in the crane rental industry, at least in the Houston-Galveston area. Under the pervasive regulatory scheme, see *Perry's Crane Service v. Port of Houston Authority of Harris County, Texas, supra*, stevedores are free to and do shop elsewhere than at the ports for cranes. Stevedores obtain direct financial benefits (among other things, lower insurance costs) from renting ports' cranes with operators which the stevedores could not get if they directly employed crane operators.

Moreover, the arrangement under the tariff is not illusory and is not imposed for the purpose of escaping liability for one's own negligence. The crane operators do, in fact, come under the supervision and control of

111. See n. 79, *supra*.

the stevedore and they operate the cranes only under the directions of a supervisory stevedore employee. In this respect there is a vast difference between the facts in the case at bar and those in *Bisso, supra,* where the employment was a pure fiction. The Supreme Court explained the basis for its rationale in *Bisso* this way, 349 U.S. at 95:

> The rule against contractual exemption of a towboat from responsibility for its own negligence cannot be defeated by the simple expedient of providing in a contract that all employees of a towboat shall be employees of the towed vessel when the latter "employment" is purely a fiction.

The positions of the crane operators are more analogous to the circumstances of the tugboat captain in *Sun Oil Co. v. Dalzell Towing Co.,* 287 U.S. 291 (1932). The contractual clause in that case provided that a tug captain who piloted a vessel propelled on its own power should be considered the servant of that vessel and that the tug owners should not be liable for the tug captain/pilot's negligence acts. The Supreme Court stressed that the contract was not governed by the doctrine that common carriers cannot by any form of agreement secure against liability for loss or damage caused by their own negligence. 287 U.S. at 292-293:

> When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that ssaid tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such

> vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom.

Moreover, it is well established law that the rule of *Bisso* is not automatically dispositive of all exculpatory clauses of common carriers. *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corps.*, 360 U.S. 411, 416 (1958). *Bisso* found an exculpatory provision in private contractual arrangements between tug and tow to offend public policy. Those considerations "are [not] necessarily applicable to provisions of a tariff filed with and subject to the pervasive regulatory authority of . . . an expert administrative body." *Id.* 360 U.S. at 416-417.

Thus, the reasonableness of the tariff provision does not turn on respondents' mere status as public utilities. It does turn on the facts and circumstances peculiar to the terminal industry. " 'Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation' Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 498." *Id.*, 360 U.S. at 421.

Here, the ports hold themselves out to provide cranes to stevedores and to have a pool of crane operators available to operate those cranes under the direction, control and supervision of the stevedores. Stevedores need not accept the operator offered by the port, but are free to choose from any qualified operator in the pool. It is not part of the ports' understaking to operate cranes for stevedores or to retain any operational control over the cranes during the rental period. The tariff provision comports with terms of crane rental agreements offered by compet-

ing private crane rental companies. The use of borrowed servants is demonstrably more advantageous, economically, to stevedores than carrying crane operators as employees on their own payroll.

In the final analysis, WGMA has failed to prove that the tariff provision exculpates the wrongdoer from its negligent acts or that the stevedores are at the mercy of the ports who are driving hard bargains from positions of power. Indeed, the tariff provisions place liability for negligence on the party exercising direction, control and supervision over the negligent employee and are accepted by the party who is now free to choose between the respondents' rental crane and a private rental crane. Even in those circumstances where the stevedore may be required to choose a port's crane, there is no evidence that the port retains any operational control over the crane operator.

Under the foregoing circumstances, I find the application of the borrowed servant doctrine to be a reasonable practice by the respondent ports.

Conclusion

Accordingly, I find that the tariff provisions and practices at PHA, Galveston Wharves and Corpus Christi which make crane operators the borrowed servant of the crane user and make the crane user liable for the negligence of the crane operator while under the supervision, direction and control of the user are not unjust and unreasonable and do not violate section 17.[112] I further

112. There is no showing that section 16 was violated.

find that section 15 approval of the tariff provision is not required.

Order

It is ordered that within 30 days after this decision becomes administratively final that the respondents, Port of Houston Authority, Port of Beaumont, Texas, Port of Port Arthur, Texas, Port of Corpus Christi (Nueces County Navigation District No. 1), Brownsville Navigation District of Cameron County, Texas, and the Orange County Navigation and Port District, Texas, cease and desist and thereafter refrain from publishing tariff provisions which state or imply that those ports (or any one of them) may act as the interpretor or sole interpretor of the meaning of the terms and conditions of the tariffs published by those respondents (or any one of them).

It is further ordered that in all other respects, the complaint of West Gulf Maritime Association is denied.

It is further ordered that this proceeding be discontinued.

/s/ SEYMOUR GLANZER
Seymour Glanzer
Administrative Law Judge

Washington, D. C.

September 21, 1979

APPENDIX A

The following are the texts of the tariff provisions which the complainant states were placed in issue. Unless otherwise noted, the concerned port respondent agrees with the complainant as to the text of the tariff provisions.

A: PHA

1. Portions of Item No. 2, *Application and Interpretation of Tariff*, reading as follows:

> The use of the waterways and facilities under jurisdiction of the Port Authority shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified and be gverned by all rules and regulations herein contained.
>
> The Port Authority reserves the right to interpret the provisions of this tariff.

2. Portions of Item No. 3, *Liability for Charges*, reading as follows:

> (a) *Responsibility For Payment*
>
> User or person desiring or proposing the use of any Port Authority property, facility or equipment may be required to deposit, in advance, an amount sufficient to satisfy anticipated cost or expense thereof; or in the alternative, may request extension of credit, in accordance with provisions of paragraph (b) of this Item No. 3.
>
> In absence of an affidavit a User thereby warrants to the Port Authority that he is liable and responsible

for payment of charges provided in this tariff and will pay the same as herein provided. If such user desires to relieve himself of such obligations, he shall (a) deposit in cash with the Port Authority the amount of charges estimated by the Port Authority to be due, and (b) in writing state the correct name and address of the owner or party warranted to be responsible for the charges.

(c) *Invoice Procedures and Liability*

1. All vessels, their owners, agents and stevedores or others, termed User in Tariff Section Three renting or using freight handling machinery or equipment will be liable for and invoiced in accordance with Item No. 15(a).

3. Portions of Item No. 15, *Provisions Applicable to Rent of Freight Handling Equipment:*[1]

1. By letter of September 21, 1978, PHA advised that the portions of Item No. 15 quoted in the Appendix were not in effect at the time the record was closed. Instead, at that time, the following provisions of Item No. 15, paragraphs (a), (c) and (d) appeared in the tariff (See, also, Ex. 53):

(a) *General*

All renting or use of freight handling machinery or equipment on Port Authority property by User shall be upon and subject to the following conditions and charges, the renting or use of which shall constitute an agreement with the Port Authority to pay such charges and be bound by such conditions.

(c) *Responsibility for Damages*

Charge for operators of its freight handling machinery will be made by Port Authority; but it is expressly stipulated that Port Authority acts solely as agent of User in engaging operators and paying them for their services.

Port Authority freight handling machinery as well as the operator thereof is turned over to User, is under User's supervision, direction and control; and User assumes sole responsibility and liability for injury to or death of any person whomsoever, or damage to or destruction of property of any such person, including employees or property of Port Authority, incident to, arising out of, or connected with User's possession, use or opera-

(a) *General*

All steamships, their owners, agents and stevedores, or others hereinafter called User, renting or using freight handling machinery or equipment on Navigation District's property, shall be upon and subject to the following conditions and charges, the renting or use of which shall constitute an agreement with the Navigation District to pay such charges and be bound by such conditions.

(c) *Responsibility for Damages*

Charge for operators of its freight handling machinery will be made by Navigation District; but it is expressly stipulated that Navigation District acts solely as agent of User in engaging operators and paying them for their services.

Navigation District freight handling machinery as well as the operator thereof is turned over to User, is under User's supervision, direction and control; and User assumes sole responsibility and liability for injury to or death of any person whomsover, or damage to or destruction of property of any such person, including employees or property of Navigation District, incident to, arising out of, or connected with User's possession, use or operation of such machinery, and shall protect, indemnify and save harm-

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tion of such machinery, and shall protect, indemnify and save harmless the Port Authority from and against any and all liability for or in respect of the same or any part thereof.

(d) *Use of Privatly-Owned Machinery and Equipment*

The use of privately-owned freight handling machinery or equipment (other than tractors, dollies, lift trucks or the like of stevedores regularly operating on Port Authority property) on Port Authority property shall not be permitted except by special permission of the Executive Director who will regulate its use and establish the conditions and charges which shall be imposed by the Port Authority for the use of its tracks, wharves or property.

less the Navigation District from and against any and all liability for or in respect of the same or any part thereof.

(d) *Use of Privately-Owned Machinery and Equipment*

The use of privately-owned freight handling machinery or equipment (other than tractors, dollies, lift trucks or the like of stevedores regularly operating on Navigation District property) on Navigation District property shall not be permitted except by special permission of the General Manager who will regulate its use and establish the conditions and charges which shall be imposed by the Navigation District for the use of its tracks, wharves or property.

B: GALVESTON

1. Portions of Item No. 5, *Application*, Definitions:

(1) *PIER DEMURRAGE OR WHARF DEMURAGE:* A charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage.

(p) *USAGE:* The use of terminal facility by any rail carrier, lighter operator, trucker, shipper or consignee, their agents, servants and/or employees, when they perform their own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

(t) *WHARFAGE:* A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed

at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

2. Portions of Item No. 30, *Application,* Responsibility for Charges, etc.:

> The use of waterways and facilities under jurisdiction of the Board of Trustees of the Galveston Wharves shall constitute consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities, to pay all charges specified, including any and all damages to property as provided in Item 75, or reissues, and to be governed by all rules and regulations contained in this tariff.

3. Portions of Item No. 105, *Application,* Lessee Responsibility:[2]

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2. Effective April 7, 1975, before the close of the record, the following changes were made in Item 105 per Galveston Wharves letter of October 31, 1978. Some aspects of this tariff provision are the subject of another Commission proceeding in Docket No. 77-56, *West Gulf Maritime Association v. The City of Galveston (Board of Trustees of the Galveston Wharves).*

> When cranes, derricks, hoists, conveyors, lift trucks, tractors and other equipment used in the moving or lifting of cargoes are rented (hereinafter called "Leased Equipment") or leased to others, it is expressly understood that such Leased Equipment will be operated under the direction and control of the Lessee, and the Lessee shall be responsible for the operation thereof and assume all risks for injuries or damages which may arise from or grow out of the use or operation of said Leased Equipment.
>
> Lessee, by acceptance of such Leased Equipment, agrees to fully protect, indemnify, reimburse and save harmless the Galveston Wharves against any and all loss or damage caused to or caused by said Leased Equipment; and should said Leased Equipment be damaged or destroyed while so leased, Lessee

When cranes, derricks, hoists, conveyors, lift trucks, trucks, tractors, etc., are rented or leased to others, it is expressly understood that the unit will be operated under the direction and control of the lessee and the lessee shall be responsible for the operation thereof, and the lessee assumes all risks for injuries or damages which may arise or grow out of the use or operation of said unit.

It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such operator during the time of rental or lease. It is incumbent upon the lessee to make a thorough inspection and satisfy himself to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation or warranties with reference to such matters.

4. Portions of Item No. 185, Section 2, Pier Demurrage Rules and Charges:

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shall pay for all necessary repairs or replacement, and, if damaged, shall pay rental for such damaged Leased Equipment until same is returned to Galveston Wharves in the same condition as received.

It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the Lessee and the operator shall be considered as the agent or servant of the Lessee and Lessee shall be responsible for the acts of such operator during time of rental or lease. It is incumbent upon the Lessee to make a thorough inspection and satisfy himself to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation of warranties with reference to such matters.

(c) *PIER DEMURRAGE RULES:*

Inbound or outbound cargo remaining on the property of the Galveston Wharves after the expiration of free time will be subject to the following rules:

(1) Pier demurrage charges on outbound cargo will be considered as for the account and responsibility of the vessel, their owners or their agents, individually or collectively.

(2) Pier demurrage charges on inbound cargo will be considered as for the account and responsibility of the owner of the cargo, the shipper, the receiver or their agents, individually or collectively.

5. Portions of Item 187, Section 2, Interference Due to Strikes:[3]

When it is impossible to remove cargo from Galveston Wharves' piers or transit sheds because of strike interference, cargo on piers or in transit sheds within the free time period will be allowed additional free time equal to period of such interference.

Cargo on piers or in transit sheds on which free time period has expired at beginning of such interference will be assessed pier demurrage during period of interference at rate of 5¢ per ton per day except cotton and cotton linters which will be assessed 2½¢ per bale per day.

The first and last day on which any strike interference occurred, such day will be included in the above special provisions.

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3. Effective October 23, 1978, after the close of the record, Item 187 was amended. Galveston Wharves letter of October 31, 1978.

C: BEAUMONT

1. Portions of Rules and Regulations as follows:

Item 100, Not Common Carrier:

The Port Authority is not a common carrier and is sole interpreter of its tariff rules and regulations.

Item 105, Payment of Charges:

All bills rendered by the Port Authority for service, claims, or for any causes whatsoever, are due and payable upon presentation, and any agents, owners, persons, firms or corporations receiving such bills and failing to make full payment within ten days after presentation shall be placed upon a Delinquent List, conditions of which are hereinafter defined.

The Port Authority does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting any port invoices or bills which may be passed on to shippers and consignees by the vessel, its owner and agent. Such bills are due when presented and must be paid regardless of when the vessel, its owner and agents are reimbursed.

Bills must be paid when presented and errors, if any, will be rectified by the Port Authority. Claims in excess of $10.00 will require specific approval of the Port Authority before refund is made.

The Port Authority reserves the right to estimate and collect in advance all charges which may accrue against vessels, their owners and agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Port Authority, whose credit has not been properly established with the Port Authority or who are habitually on the Delinquent List. Use of such facilities may be denied until such advance payments or deposits are made.

The Port Authority reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and agents, or other users of the facilities.

Item 115-c, Wharfage Rules:

(A) Wharfage charges earned on cargo placed on Port Facilities must be paid by vessel owners (operators) or their agents or owner or forwarder of the cargo and placing of such cargo on Port Facilities shall be deemed an acceptance and acknowledgment of this responsibility. Vessel owners (operators) or their agents shall furnish Port Authority manifests on inbound and outbound cargo, as the case may be, loaded to or from Port Facilities.

EXCEPTION—Where provisions are made with owner or agents of cargo, wharfage charges must be collected direct from owner or agent of the cargo.

Item 165, Consent to Terms of Tariff:

The use of the facilities under the jurisdiction of The Port Authority shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents and other users of such facilities to all such charges specified in this tariff and be governed by all rules and regulations herein contained.

D: PORT ARTHUR[4]

1. Portions as follows:[5]

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4. Complainant introduced Ex. 49, containing Item 605-A of Port Arthur's tariff dealing with use of privately owned cranes. See Port Arthur letter of November 16, 1978.

5. The portions appeared in Tariff No. 1-A. Tariff No. 1-B is now in effect. Although the provisions have been renumbered, the language remains the same. See Port Arthur letter of October 13, 1978.

Item 105, Not Common Carrier:

The Port Authority is not a common carrier and is sole interpreter of its tariff rules and regulations.

Item 110-A, Payment of Charges:

All bills rendered by the Port Authority for service, claims or for any causes whatsover, are due and payable upon presentation, and any Agents, Owners, person, firms or corporations receiving such bills and failing to make full payment within ten days after presentation shall be placed upon a Delinquest List, conditions of which are hereinafter defined.

The Port Authority does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting any port invoices or bills which may be passed on to shippers and consignees by the vessel, its Owner and/or Agent. Such bills are due when presented and must be paid regardless of when the vessel, its Owner and/or Agents are reimbursed.

Bills must be paid when presented and errors, if any, will be rectified by the Port Authority. Claims in excess of $10.00 will require specific approval of the Port Authority before refund is made.

The Port Authority reserves the right to estimate and collect in advance all charges which may accrue against vessels, their Owners and/or Agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Port Authority, whose credit has not been properly established with the Port Authority or who are habitually on the Delinquent List. Use of such facilities may be denied until such advance payments or deposits are made.

The Port Authority reserves the right to apply any payment received against the oldest bills rendered

against vessels, their Owners and/or Agents, or other users of the facilities.

Item 120, Wharfage Rules:

(A) Wharfage charges earned on import cargo placed on Port Facilities must be paid by vessel owners (operators) or their Agents and placing of such cargoes on Port Facilities shall be deemed an acceptance and acknowledgment of this responsibility. Vessel Owners (Operators) or their Agents shall furnish Port Authority manifests on import and outbound cargo, as the case may be, loaded to or from Port Facilities. See Exception 1.

EXCEPTION 1. — Where specific arrangements are made with owner or agent of import cargo guaranteeing payment of import wharfage charges, such charges will be collected direct from said owner or agent of the cargo.

(B) Wharfage charges earned on export, Coastwise, Intracoastal, or local cargo must be paid by owner or agent of cargo and placing of such cargo on Port Facilities shall be deemed an acceptance and acknowledgment of these responsibilities. See Exception 2.

EXCEPTION 2. — Where specific arrangements are made with owners or agents of export, Coastwise, Intracoastal, or local cargo guaranteeing payment to Port Authority of wharfage charges earned on export, Coastwise, Intracoastal or local cargo by a railroad, truck line, or other party, such charges will be collected from such railroad, truck line, or other party as the case may be.

Item 175, Consent to Terms of Tariff:

The use of the facilities under the jurisdiction of the Port Authority shall constitute a consent to the

terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their Owners and/or Agents and other users of such facilities to all such charges specified in this Tariff and to be governed by all rules and regulations herein contained.

E: CORPUS CHRISTI[6]

1. Portions of Tariff definitions, as follows:

   3. Wharfage—A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

   9. Usage—The use of terminal facility by any rail carrier, lighter operator, trucker, shipper, or consignee, their agents, servants, and/or employees, when they perform their own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

2. Portions of Rules and Regulations, as follows:

   Item 15, Payment of Charges and Responsibility Therefor; Extensions of Credit; and Liens:

   Wharfage, wharf demurrage, car loading and unloading (when not absorbed by the ocean carriers) are due from the owner, shipper or consignee of the

6. Complainant also introduced Exs. 47 and 51 containing provisions dealing with crane rental. See Corpus Christi letter of November 15, 1978.

cargo, and shall be collected for and on behalf of the Navigation District by the vessel discharging or loading the cargo, or for which the cargo was received, through the vessel's owner, agent or other person duly authorized to do so, and such vessel and its owner and agent, jointly and severally, shall guarantee and be liable for the payment of such charges to the Navigation District whether or not collected by such vessel or its owner or agent. The use of the wharf or other terminal facility by the vessel or its owner or agent shall constitute acceptance and acknowledgment of this agency, guaranty and liability.

All bills rendered by the Navigation District for wharfage, dockage, wharf demurrage, shed and/or wharf use hire, charges for providing water and electricity, charges for equipment rental, charges for cleaning wharves and sheds, charges for terminal storage, special services, other services and claims or for any causes whatsoever, are due and payable in cash upon presentation, unless arrangements for extension of credit are made. When credit arrangements have been made, any agents, owners, persons, firms or corporations receiving bills and failing to make full payment after presentation within the time permitted under the credit arrangements may be placed upon a cash basis.

The Navigation District does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting any port invoices or bills which may be passed on to shippers and consignees by the vessel, its owner and agent. Such bills must be paid regardless of when the vessel, its owner and agents, are reimbursed. Any errors in bills will be rectified by the Navigation District.

The Navigation District reserves the right to estimate and collect in advance all charges which may accrue against vessels, their owners and agents, or

against cargo loaded or discharged by such vessels, or from other users of the facilities of the Navigation District, whose credit has not been properly established with the Navigation District. Use of such facilities may be denied until such advance payments or deposits are made.

The Navigation District, at its option and subject to termination at its election, may at any time and from time to time extend credit to any user or other person conducting business with the Navigation District under the provisions of this tariff or amendments or reissues thereof by such user or other person establishing and maintaining financial responsibility acceptable to the Navigation District, or by posting and maintaining a single transaction or a period or an annual surety bond in form and content and with corporate surety acceptable to the Navigation District in amount equal to 125% of maximum liability on a single transaction or equal to an estimated period or estimated annual maximum liability. Further extension of credit may be suspended or terminated by the Navigation District subject to the establishment of added or extended credit acceptable to the Navigation District.

The Navigation District reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and agents, or other users of the facilities.

Presentation of bills to owners and agents of vessels or to stevedores is done as a matter of accommodation and convenience and shall not constitute a waiver of the liens for charges furnished a vessel for which the maritime law gives the lien.

Item 35, Responsibility for Loss or Damage:

Users of its facilities agree to indemnify and save harmless the Navigation District from and against

all losses, claims, demands, and suits for damages, including death and personal injury, and including court costs and attorneys' fees, incident to or resulting from their operations on the property of the Navigation District.

Item 52, Application and Interpretation of Tariff:

The use of the waterways and facilities under jurisdiction of the Navigation District shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified and be governed by all rules and regulations herein contained.

The Navigation District shall be the sole judge as to the interpretation of this tariff.

F: BROWNSVILLE

1. Portions of Section One—General Rules and Regulations, as follows:

Item 105, Consent to Terms:

Use of the public wharves and related facilities shall constitute consent to the terms and conditions of this tariff, including the payment of all applicable charges specified herein.

Item 110, Collection of Charges:

The District may, at its discretion, extend customary trade credit or require the posting of bond or prepayment of charges. Vessel charges, as set out hereinafter, shall constitute a lien against the vessel and/or her agents. Cargo charges, as set out here-

inafter, shall constitute a lien against the merchandise or commodity and/or the custodian at the port thereof. Service charges shall be payable by the party requesting such service.

Item 111, Service Charge on Past Due Accounts:

On all invoices except lease rentals: A service charge will be assessed on all accounts over 30 days old, at a monthly rate of 1½% on the first $500, and 1% on amounts over $500, with a minimum monthly charge of $0.50. *Exception:* Brownsville steamship agencies and stevedoring companies will be assessed on all accounts over 60 days old at the same rates as shown above.

Item 115, Interpretation of Tariff:

The District further reserves the right to be the sole judge in the interpretation of this tariff or any supplements thereto.

G: ORANGE

1. Portions of Application, as follows:

Item 85, Responsibility for Wharfage:

On shipments inward and outward bound, handled over the wharves or piers, or on shipments handled direct between barges or vessels, and vessels that are berthed at wharves or piers, the shipper will be held responsible for wharfage charges, and will not be permitted to load any property from the wharves or piers, or from barges or vessels onto a vessel without prepayment of the wharfage charges, or until satisfactory provisions have been made for the payment.

2. Portions of Rules and Regulations, as follows:

Item 115, Interpretation of Tariff:

The Port District shall be the sole judge as to the interpretation of its Tariff rules and regulations.

Item 120, Payment of Charges:

All bills rendered by the Port District for service, claims or for any causes whatsoever, are due and payable upon presentation, and any owners, agents, companies or persons receiving such bills and failing to make full payment within ten days after presentation shall be placed upon the delinquent list, conditions of which are hereinafter defined.

The Port District does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting storage and similar bills which may be passed on to shippers and consignees by the vessel, its owners and agents. Such bills are due when presented and must be paid regardless of when the vessel, its owners and agents, are reimbursed.

Bills must be paid when presented, and errors, if any, will be rectified by the Port District. Claims in excess of $10.00 will require specific approval of the Port District before refund is made.

The Port District reserves the right to estimate and collect in advance all charges which may accrue against vessels, their owners and agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Port District whose credit has not been properly established with the Port District or who are habitually on the delinquent list. Use of facilities may be denied until such advance payments or deposits are made.

The Port District reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and agents, or other users of facilities.

Item 130, Wharfage:

(A) Wharfage charges must be paid by owner or agent of cargo and placing of said cargo on Port facilities shall be deemed an aceptance and acknowledgment of this responsibility.

Item 195, Consent to Terms of Tariff:

The use of the facilities under the jurisdiction of the Port District shall constitute a consent to the terms and conditions of this Tariff, and evidences an agreement on the part of all vessels, their owners and agents and other users of such facilities to pay all charges specified in this Tariff and be governed by all rules and regulations herein contained.

APPENDIX B

Contentions of Complainant and Respondents

1. Points in WGMA's Opening Brief

Point One - Each of the tariffs here complained of provides that use of the Port's facilities constitutes consent to be bound by all of the tariff provisions. Such language is a nullity, because lawful tariff provisions do not rest on consent but as a matter of law are binding upon all persons subject to them. Therefore use cannot lawfully be the equivalent of agreement. These provisions should therefore be ordered stricken and given no consideration in the determination of this complaint;

Point Two - Interpretation of a port's tariffs is a matter within the jurisdiction of the Federal Maritime Commission and the courts, and the statements in respondents' tariffs that they are to be interpreters of their tariffs are void as a matter of law as attempts to oust such jurisdiction;

Point Three - The ports tariff provisions, and billing practices, that make agents for vessels using port facilities personally liable for their principals' port charges are unlawful because the charges are obligations of third persons not agreed in writing to be borne by the agent and therefore unenforceable under the Texas Statute of Frauds, and contrary also to the Law of Principal and Agent, and violate sections 16 and 17 of the Shipping Act of 1916 (46 U.S.C.A. §§ 815, 816) in subjecting vessels' agents to an unreasonable disadvantage and to unjust and unreasonable regulations and practices;

Point Four - The ports' tariff provisions and billing practices which subject vessels' agents to responsibility for collecting, and personal liability for, wharfage and pier demurrage (which are liabilities of cargo) are unenforceable under the Texas Statute of Frauds, and they violate sections 16 and 17 of the Shipping Act of 1916 (46 U.S.C.A §§ 815, 816) because they subject agents to

unreasonable disadvantages and are unjust and unreasonable.

Point Five - Requiring renters of cranes and other heavy equipment from the ports *ipso facto* to become liable for the negligence of the operators of that equipment, who are employees of the Port, is violative of section 16 of the Shipping Act of 1916 (46 U.S.C.A. § 815) in subjecting stevedores to undue and unreasonable disadvantages, and unjust and unreasonable and hence unlawful under section 17 of that Act; and

Point Six - The Galveston Wharves' tariff provision assessing strike penalty pier demurrage rates according to the status of cargo at the commencement of the strike is patently discriminatory and unlawful under sections 16 and 17 of the Shipping Act of 1916 (46 U.S.C.A. §§ 815, 816) because all of the strike-bound cargoes are in an identical position during a strike and assessing different charges on cargoes in an identical position is plainly unjust and unreasonable.

2. Points in Respondents' Answering Brief

Counterpoint One - Complainant has wholly failed to sustain its burden of proof by reliable, probative evidence that respondents' tariffs, or their practices thereunder, make or give any undue or unreasonable preference or advantage (section 16) or that the complained of tariffs and practices thereunder are unjust and unreasonable (section 17).

Reply Point One (germane to WGMA's Point One) - Tariff provisions that the use of the port facilities constitutes consent to be bound by the tariffs are merely a statement of the law, clearly informing users of the applicability of the tariffs and their responsibilities thereunder. Complainant claims that such tariff provisions are unlawful, but fails to offer any evidence that such language or port practices thereunder constitute an unreasonable preference or advantage or that such provision is unjust and unreasonable.

Reply Point Two (germane to WGMA's Point Two) - Provision in some of respondents' tariffs that the issuer of the tariff shall be the interpreter of their tariffs does not, cannot and is not intended to oust jurisdiction of the Federal Maritime Commission and the courts. The interpretation provision does serve a useful purpose in non-litigious inquiries and situations, particularly involving complex and technical interpretation of language terms common to the trade and relating to customs of the port.

Reply Point Three (germane to WGMA's Points Three and Four) - Ports' tariff provisions and billing practices assessing responsibility for charges upon vessels, their owners and agents and other users of the facilities are not only lawful but essential to insure collection of port charges and the continued economic viability of public ports. Such tariff provisions, rather than resulting in agents being held responsible for debts of others, impose a direct obligation upon the agents for collection of port charges.

Reply Point Four (germane to WGMA's Point Five) - Ports' tariff provisions concerning the responsibility of lessees of cranes and other such heavy equipment providing that any leased operator of the port shall be under the direction of the lessee and shall be considered as lessee's employee are reasonable requirements, uniform in the port industry and non-discriminatory.

Reply Point Five (germane to WGMA's Point Six) - The Galveston Wharves' tariff provision eliminating penalty portion of demurrage rate and making additional free time allowance during strike period is most reasonable, makes or gives no undue or unreasonable preference or advantage and is consistent with Commission rulings.

3. Points in WGMA's Reply Brief

First Reply Point - The tariff provisions here stating that use of port facilities "constitutes a consent to the terms and conditions of this tariff" is not a statement of the

law: Use of a public utility's facilities constitutes consent only to be bound by *lawful* tariff provisions. The tariff language is unjust and unreasonable and therefore violative of Section 17 of the Shipping Act of 1916 and lawfully should be disregarded;

Second Reply Point - The provision in the tariffs that the port is to be the "sole judge" or "sole interpreter" of the tariff's meaning is unlawful, and hence unjust within Section 17 of the Shipping Act of 1916;

Third Reply Point - As Texas municipal corporations respondents are subject to the laws of the State of Texas. As instruments of interstate and foreign commerce they are subject to applicable laws of the United States. Respondents' tariff provisions making vessels' agents responsible for vessels' and cargo owners' port charges are violative of both bodies of law and cannot lawfully be upheld as just and reasonable under Section 17 of the Shipping Act of 1916;

Fourth Reply Point - Respondents have reasonable alternatives for collection of their charges to holding steamship agents liable for collection and payment of port charges. It is unjust and unreasonable for respondents to impose such liability on steamship agents since it is done simply for respondents' convenience;

Fifth Reply Point - Respondents' monopolistic position with respect to use on their premises of their rented heavy lift equipment makes their tariff provisions exculpating themselves from liability for the negligence of their employees unlawful under well-established legal principles, and hence these tariff provisions should be found unjust and unreasonable and hence unlawful also under Section 17 of the Shipping Act of 1916;

Sixth Reply Point - The Galveston strike demurrage charge is plainly discriminatory, and not based on compensation for services rendered, and therefore unlawful under Sections 16 and 17 of the Shipping Act of 1916.

JUDGMENT SOUGHT TO BE REVIEWED

NOT TO BE PUBLISHED—SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

[No Opinion]

September Term, 1980

NO. 80-1498

WEST GULF MARITIME ASSOCIATION,
Petitioner

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents

ORANGE COUNTY NAVIGATION DISTRICT *et al.*,
Intervenors

Petition for Review of an Order of the Federal Maritime Commission.

Before: WRIGHT and WILKEY, Circuit Judges, and CORCORAN,* Senior District Judge.

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Federal Maritime Commission and was

* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

argued by counsel. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. *See* Local Rule 13(c).

This court is of the view that the tariff provisions in dispute are "just and reasonable" under Section 17 of the Shipping Act, 46 U.S.C. § 816 (1976). In determining whether tariffs are "just" under Section 17 the Commission in some circumstances may consider state law. In this case the Commission did consider Texas law, but concluded that the provisions were not contrary to that state law. We agree and therefore affirm the Commission's holding that the tariff provisions in question are "just and reasonable" under Section 17. We also agree with the Commission that the strike demurrage provision contained in the tariff of the Galveston port is not discriminatory and is therefore lawful under Section 16 of the Shipping Act, 46 U.S.C. § 815 (1976).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the order of the Federal Maritime Commission sought to be reviewed herein is affirmed.

Per Curiam

For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Office-Supreme Court, U.S.
FILED
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No. 80-2213

In the Supreme Court of the United States

OCTOBER TERM, 1980

WEST GULF MARITIME ASSOCIATION, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner contends that the tariffs of seven Texas ports are inconsistent with Texas law and therefore are unjust and unreasonable in violation of Section 17 of the Shipping Act of 1916, 46 U.S.C. 816. The ports are state or municipal government agencies who operate terminal facilities on the Texas Gulf Coast.[1] They are required by Texas law to levy fees for the use of the port's facilities that are sufficient to cover expenses (Pet. App. 28). Petitioner is a trade association representing, among others, vessel agents (*id.* at 27)—the local agents of vessels' owners and operators (*id.* at 36). The tariffs challenged in this Court make vessel

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[1]Those ports, intervenors here, are the Port of Houston Authority, the City of Galveston, the Port of Beaumont, the Port of Port Arthur, the Port of Corpus Christi, the Brownsville Navigation District, and the Orange County Navigation and Port District.

agents liable for certain charges—dockage, shed and pier use, wharfage, and outbound cargo demurrage—which, petitioner asserts, should be levied only against the vessels themselves or the cargo interests (*id.* at 29-30).[2]

Petitioner challenged the tariffs in a proceeding before the Federal Maritime Commission. After a full evidentiary hearing, the administrative law judge rejected petitioner's claim. He found that the ports hold vessel agents liable "[p]recisely because [the] agents are local" (Pet. App. 36) while the owners or operators might be hard to find (see *id.* at 37). He also found that vessel agents, aware that they will be held responsible for charges, carefully investigate a principal's credit worthiness before agreeing to be its agent and often insist on advances from their principals (*id.* at 36-37). He concluded that the tariffs did not impose an "undue or unfair burden on" the agents (*id.* at 41). He then considered and rejected petitioner's argument that the tariffs made the agents liable for the vessels' debts in violation of the Texas Statute of Frauds (*id.* at 76; footnote and citation omitted):

> [T]he Statute of Frauds is never brought into play. These tariffs, which make agents liable for payment of vessel charges, impose that liability directly on the agents as users--and--having used the facilities provided by the ports, the agents accept the terms of the tariff. * * * Thus, none of the tariff provisions call for vessels agents to answer for the debt of another. The debt they pay is their own.
>
> Moreover, the Commission has held that "while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not alone dispositive of Shipping Act issues, absent a

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[2]Petitioner challenged other tariffs below but does not renew those claims here.

> showing that these principles directly apply to Shipping Act considerations." * * * [Petitioner] has made no such showing here.

The administrative law judge accordingly found that the tariffs were not unreasonable or unjust in violation of the Shipping Act (*id.* at 80).

The Federal Maritime Commission adopted the administrative law judge's decision (Pet. App. 21), concluding that "the port charges for which the vessel agents are made liable are reasonably related to the vessel interests' use of the ports, and are therefore reasonably borne by the vessel agents" (*id.* at 19). The Commission added that it agreed with the administrative law judge's conclusion that "the statute of frauds issue raised by [petitioner] is inapplicable and is not controlling absent a showing that the state law principles directly apply to Shipping Act considerations" (*ibid.* n.5).

The court of appeals upheld the Commission's order. It said (Pet. App. 114):

> In determining whether tariffs are "just" under Section 17 the Commission in some circumstances may consider state law. In this case the Commission did consider Texas law, but concluded that the provisions were not contrary to that state law. We agree and therefore affirm the Commission's holding that the tariff provisions in question are "just and reasonable" under Section 17.

2. Petitioner now claims simply that the tariffs are unjust under Section 17 of the Shipping Act because they violate Texas law. This is essentially the same claim that petitioner made, and the Court declined to review, in *West Gulf Maritime Association* v. *Port of Houston Authority*, 610 F. 2d 1001 (D.C. Cir. 1979), cert. denied, No. 79-1646 (Oct. 6, 1980). It is no more worthy of review now. Petitioner

claims a right under the Shipping Act of 1916. The interpretation of that federal statute is a matter of federal law; state law is relevant only to the extent that federal law incorporates it. Accordingly, *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), relied on by petitioner, is inapplicable. For the reasons given in the opinions of the administrative law judge and the Commission, and in our Memorandum in Opposition in *West Gulf Maritime Association* v. *Port of Houston Authority, supra*—reasons with which petitioner does not now quarrel, except to make the unsupported assertion that they are not "substantial" enough (Pet. 13)—the Commission had more than a sufficient basis for finding the challenged tariffs just and reasonable. The Commission has consistently interpreted Section 17 to refer to other considerations besides lawfulness under state law. See, *e.g.*, *Agreement No. T-1870: Terminal Lease Agreement at Long Beach, California*, 11 F.M.C. 12, 26 (1967); *Agreement No. T-4: Terminal Lease Agreement at Long Beach, California*, 8 F.M.C. 521, 533-534 (1965). Petitioner has shown no reason to believe that Congress, in passing the Shipping Act, intended state law to control the definition of "just" and "reasonable."

Even if state law did control, the Commission and the court of appeals determined that the tariffs are legal under state law and this Court would not ordinarily review that determination. Sup. Ct. R. 17.1; *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). Moreover, petitioner's state law arguments appear to be incorrect. Petitioner asserts that under the Texas Statute of Frauds a promise to pay for the debt of another is unenforceable unless it is in writing, and that an agent is generally not liable on a contract he enters into for the benefit of his principal. But these rules of Texas law make the agents' obligations unenforceable only if the sole basis of the obligations is the agents' liability as guarantors of the ports' claims against the principals. In fact, the

agents' liability is based not on contracts between the ports and the principals but—as the administrative law judge noted—on the contracts that the agents form on their own behalf with the ports when they take advantage of the ports' facilities.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS, et al.,
Intervenors

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF INTERVENORS PORT OF HOUSTON AUTHORITY, et al., IN OPPOSITION

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BRIEF OF INTERVENORS PORT OF HOUSTON AUTHORITY, et al., IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Port of Houston Authority of Harris County, Texas, the City of Galveston [Galveston Wharves], Port of Beaumont Navigation District of Jefferson County, Nueces County Navigation District #1 [Port of Corpus

Christi], Brownsville Navigation District, Port of Port Arthur Navigation District of Jefferson County and Orange County Navigation District and Port Administration, [hereinafter referred to collectively as Intervenors] urge that the Petition for Writ of Certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit filed in the above cause be denied. All references to appendices contained herein are to the Appendix to the Petition, pages 1 through 114.

OPINIONS BELOW

Intervenors accept Petitioner's description of the Opinions Below.

JURISDICTION

Intervenors do not contest the jurisdiction of this Court as invoked by the Petition for Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

Intervenors are all public entities, governmental agencies and political subdivisions of the State of Texas which own and operate public port facilities at various locations within that State. As operators of public terminals, Intervenors must offer services and facilities to all for the same charges and on the same conditions and pursuant to publicly published tariffs, the provisions of which may not be varied from user to user.

Petitioner instituted a complaint proceeding before the Federal Maritime Commission seeking to have certain specified provisions of Intervenors' tariffs declared unjust, unreasonable, discriminatory and unlawful as violative of sections 15 and 17 of the Shipping Act of 1916 (46

U.S.C. 801, et seq.). In essence, the provisions complained of here are those that recognize vessel agents to be "users" of port facilities and as such, to be responsible for the payment of port charges reasonably related to the vessel interests they represent. Contrary to its statement at page 4 of the Petition, Petiioners' complaint was filed on behalf of all its members, i.e., steamship agents, the owners of some of those vessels, and stevedoring firms whose employees load and unload those vessels (App. p. 27), not as there reflected, only on behalf of its steamship agent members.

After a hearing which consumed 13 days and resulted in the development of 1962 pages of transcript and the introduction of 65 numbered exhibits (App. p. 29), the Administrative Law Judge filed an exhaustive opinion (App. pp. 24-90) upholding the contested tariff provisions in all respects save one. The single provision which was declared unlawful involved the declaration by some ports that they reserved to themselves the right to be the sole interpreters of the provisions of their own tariffs. Pursuant to the Order of the Administrative Law Judge (App. p. 90) the offending provisions of Intervenors' tariffs were deleted and are not at issue here. Of those upheld below, Petitioner here complains only of those related provisions of Intervenors' tariff which make wharfage charges the responsibility of vessel interests and require vessel agents, as users of port facilities, to be held accountable for payment thereof. In essence, Petitioner seeks once again to litigate the very issue previously determined in *West Gulf Maritime Association v. F.M.C. and U.S.A.*, 610 F.2d 1001 (C.A.-D.C. 1979), cert. denied, 101 S.Ct. 81, ____U.S.____ (1980). That Petitioner has been unable to demonstrate any valid reason

why that prior decision is not dispositive of this matter is revealed in the opinion of the Administrative Law Judge (App. p. 73), in the decision of the Federal Maritime Commission (App. p. 19) and in the decision of the United States Court of Appeals for the District of Columbia Circuit (App. p. 113). In that case this same Petitioner contested, *inter alia,* the following language found in the Port of Houston Authority's tariff:

> "3. Terminal Charges, set forth in Item No. 59, and Wharfage Charges, set forth in Item No. 65, are liabilities of the owners of the cargo; however, the collection and payment of same to the Port Authority *must be guaranteed by* the vessel, her owners and *agents, and the use of* Port Authority *facilities by the* vessel, her owners and *agents, shall be deemed an acceptance* and acknowledgment of this guarantee." (emphasis added)

It was urged that such provisions were unlawful because in conflict with Texas Law. There, as here, the Federal Maritime Commission determined that tenets of state and common law are not alone dispositive of Shipping Act issues absent a showing that such principles directly apply to Shipping Act considerations (App. pp. 76 and 19). Stated another way, whether or not a tariff provision might be determined unlawful as contrary to state law, were it to be tested in state court and so found, it would not necessarily follow that such provision would be unjust and unreasonable and therefore unlawful within the meaning of Section 17 of the Shipping Act unless the particular principles of state law had direct application to Shipping Act considerations.

The Question Presented at page I of the Petition is therefore misleading in the extreme as it wrongfully as-

sumes that the tariff provisions in issue are contrary to state law, since the findings below were to the contrary, and further assumes that unspecified principles of state law have direct application to Shipping Act considerations. Further, the Question Presented ignores the fact that, as noted by the Court of Appeals, the Commission did consider Texas law, but concluded that the subject provisions were not contrary thereto and specifically agreed with that conclusion (App. p. 114).

QUESTION PRESENTED

Thus the sole question presented is: Whether the Federal Maritime Commission, the body having primary responsibility for the administration and enforcement of the Shipping Act of 1916 (46 U.S.C. 801, et seq.) correctly found the provisions of Intervenors' tariffs to be just and reasonable regulations and practices within the terms of Section 17 of that Act (46 U.S.C. 816)?

STATUTES AND REGULATIONS INVOLVED

The statement of Statutory Provisions Involved as set out in the Petition is incomplete. The Statement omits reference to the provisions of the Texas Water Code authorizing navigation districts such as Intervenors to build, own and operate facilities common to public ports, Section 60.101, and placing upon Intervenors the burden to fix charges sufficient to produce revenues to pay their expenses, Section 60.103 (App. p. 28).

REASONS FOR DENYING THE WRIT

A.

THE DECISIONS BELOW ARE CONSISTENT WITH EXISTING DECISIONS UNDER THE SHIPPING ACT OF 1916 AND WITH PRIOR DECISIONS OF THIS COURT AND PRESENT NO QUESTION OF SUBSTANTIAL IMPORTANCE

Intervenors respectfully suggest that Petitioner wholly fails to present any question of significant importance which would be in the public interest to have decided by the Court of last resort of the United States and wholly fails to demonstrate any special or important reasons for granting the writ as required by Supreme Court Rule 17. Petitioner does not allege conflicting Court of Appeals' decisions, does not demonstrate that the holding below is contrary to decisions of this Court, nor is it shown that State law is applicable or controlling. Petitioner contended below that certain provisions of Intervenors' tariffs were unlawful pursuant to Texas State law and hence proscribed by Section 17 of the Shipping Act of 1916 (46 U.S.C. 816). After full consideration, the Federal Maritime Commission, the agency primarily responsible for administration of that Act, as well as the Court of Appeals for the District of Columbia Circuit, resolved that issue against Petitioner. The issue here presented is neither of sufficient importance nor sufficiently in the public interest, to warrant the time and attention of this Honorable Court. It is at best of interest only to the parties hereto, and the Petition should therefore be denied. *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 58 S.Ct. 860, 82 L.Ed. 1290 (1938); *Magnum Import Co. v. Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923).

B.

THE TARIFF PROVISIONS CHALLENGED HEREIN ARE NOT VIOLATIVE OF THE LAWS OF THE STATE OF TEXAS, THE COMMON LAWS, OR OF THE SHIPPING ACT OF 1916 (46 U.S.C. 801, et seq.).

Petitioner asserts that an agent is not liable upon the contracts of his disclosed principal under Texas law. In so doing Petitioner ignores the finding of the Administrative Law Judge below that normally agents do not inform the ports of the identity of the vessel interests when making berth arrangements and that as a result ports are generally unaware of such matters (App. p. 40). Petitioner also ignores the finding that agents sometimes act for undisclosed principals (App. p. 40). The Federal Maritime Commission having approved those findings (App. p. 18), the Court of Appeals having affirmed (App. p. 114), and Petitioner not having challenged the basis thereof in the substantial evidence, it cannot now contend that its agent members are agents for disclosed principals.

Petitioner's complaint that agents have not consented to be liable personally for the debts of their principals is equally flawed. The Administrative Law Judge held that any differences between the tariff provisions and practices placing liability for payment of vessel charges on vessel agents in *West Gulf Maritime Association v. FMC and United States of America,* supra, and the tariff provisions and practices placing liability for payment of vessel charges on vessel agents in the instant proceeding are neither substantive nor substantial (App. p. 75). He further held that the ports rely upon the agents' credit not the credit of the absentee vessel interests. The Federal Maritime Commission agreed and noted an earlier deci-

sion involving Petitioner to the same effect (App. p. 19). Petitioner did not challenge the substantial nature of the evidence supporting those findings and is thus not now privileged to ignore their effect.

Under Texas law consent to the terms of a unilaterally promulgated tariff is not necessary. Reference to the decisions in *City of Galveston v. Kerr Steamship Company*, 362 F.Supp. 289 (S.D. Tex., 1973); aff'd. per curiam 503 F.2d 1401 (C.A. 5, 1974) cert. denied, 420 U.S. 975 (1975) and *Rorie v. The City of Galveston*, 471 S.W.2d 789 (Tex. 1971) cert. denied, 405 U.S. 988, 92 S.Ct. 1250, 31 Law Ed. 2nd 454 (1972), both of which apply Texas Law, reveals that both cases affirmed the imposition of unilaterally promulgated tariff terms upon parties unwilling to accept the force of law behind those provisions.

In addititon to the fact that the record reflects the practices complained of herein by Petitioner have been followed for many years at the Intervenor ports, and that some of Petitioner's own witnesses testified as agents that such practices were not unjust, unreasonable or unfair (App. p. 35), the Federal Maritime Commission has previously considered similar provisions, and has found them not to be unlawful. *West Gulf Maritime Association v. F.M.C. and U.S.A.*, 610 F.2d 1001 (1979), cert. denied 101 S.Ct. 81, ____U.S.____ (1980). Shifting the responsibility for the collection and payment of charges such as those at issue does not constitute an unjust and unreasonable practice within the meaning of Section 17 of the Shipping Act of 1916. *Boston Shipping Association, Inc., et al. v. Port of Boston Marine Terminal Association and Massachusetts Port Authority*, 11 F.M.C. 1 (1965) and *Boston Shipping Association, Inc., et al v.*

Port of Boston Marine Terminal Association, et al., 10 F.M.C. 409 (1967).

Petitioner also misstates Texas law with regard to duress and business coercion. It has long been the law in Texas that duress

> ". . . cannot exist without there being a threat to do some act which the threatening party has no legal right to do—some illegal execution or some fraud or deception. The restraint must be imminent and such as to destroy free agency without present means of protection."

The foregoing is from the 1922 decision of the Texas Commission of Appeals in *Ward v. Scarborough*, 236 S.W. 434 (Tex. Com. App. 1922). Petitioner has not brought itself within the scope of that rule.

From the foregoing it can be seen that the tariff provisions in question do not run contrary to the laws of the State of Texas. Likewise they are not unjust or unreasonable regulations or practices under Section 17 of the Shipping Act of 1916 (46 U.S.C. 816). This latter contention was examined in depth both by the Administrative Law Judge and by the Federal Maritime Commission, and both decisions emphasized that the vessel agents in fact make arrangements for vessel berthing directly with the terminal operator, and in so doing becomes users of the facilities and incur the obligation to pay the tariff charges in question (App. p. 75 and 19).

A valid business need has been demonstrated for the tariff provisions in question. They have been held below to constitute just and reasonable regulations and to be fit and appropriate to the end in view. *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525

(1966); *Boston Shipping Association, Inc., et al. v. Port of Boston Marine Terminal Association and Massachusetts Port Authority,* 11 F.M.C. 1 (1965). The agents' consent to the terms of a tariff is not required under Texas law. *Rorie v. The City of Galveston,* 471 S.W.2d 789 (Tex. 1971) cert. denied, 405 U.S. 988, 92 S.Ct. 1250, 31 Law Ed. 2nd 454 (1972); *City of Galveston v. Kerr Steamship Company,* 362 F.Supp. 289 (S.D., Tex., 1973); aff'd per curiam 503 F.2d 1401 (C.A. 5, 1974) cert. denied, 420 U.S. 975 (1975). Holding agents responsible for the collection and payment of port charges incurred by the vessels they represent is not violative of the Shipping Act of 1916 (46 U.S.C. 801, et seq.). *West Gulf Maritime Association v. F.M.C. and U.S.A.,* 610 F.2d 1001 (C.A.-D.C. 1979) cert. denied 101 S.Ct. 81, ____U.S.____ (1980).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari previously filed herein should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that service of three copies of the Brief of Intervenors Port of Houston Authority, et al. in Opposition to the Petition for Writ of Certiorari has been made on each of the following named persons, by air mail, postage prepaid:

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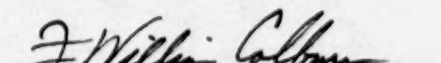

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